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In the Supreme Court of the United States.

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JAMES H. McKENN
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No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,

APPELLANT,

vs

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY,

APPELLEES,

AND

No. 321.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY,

APPELLANTS,

vs.

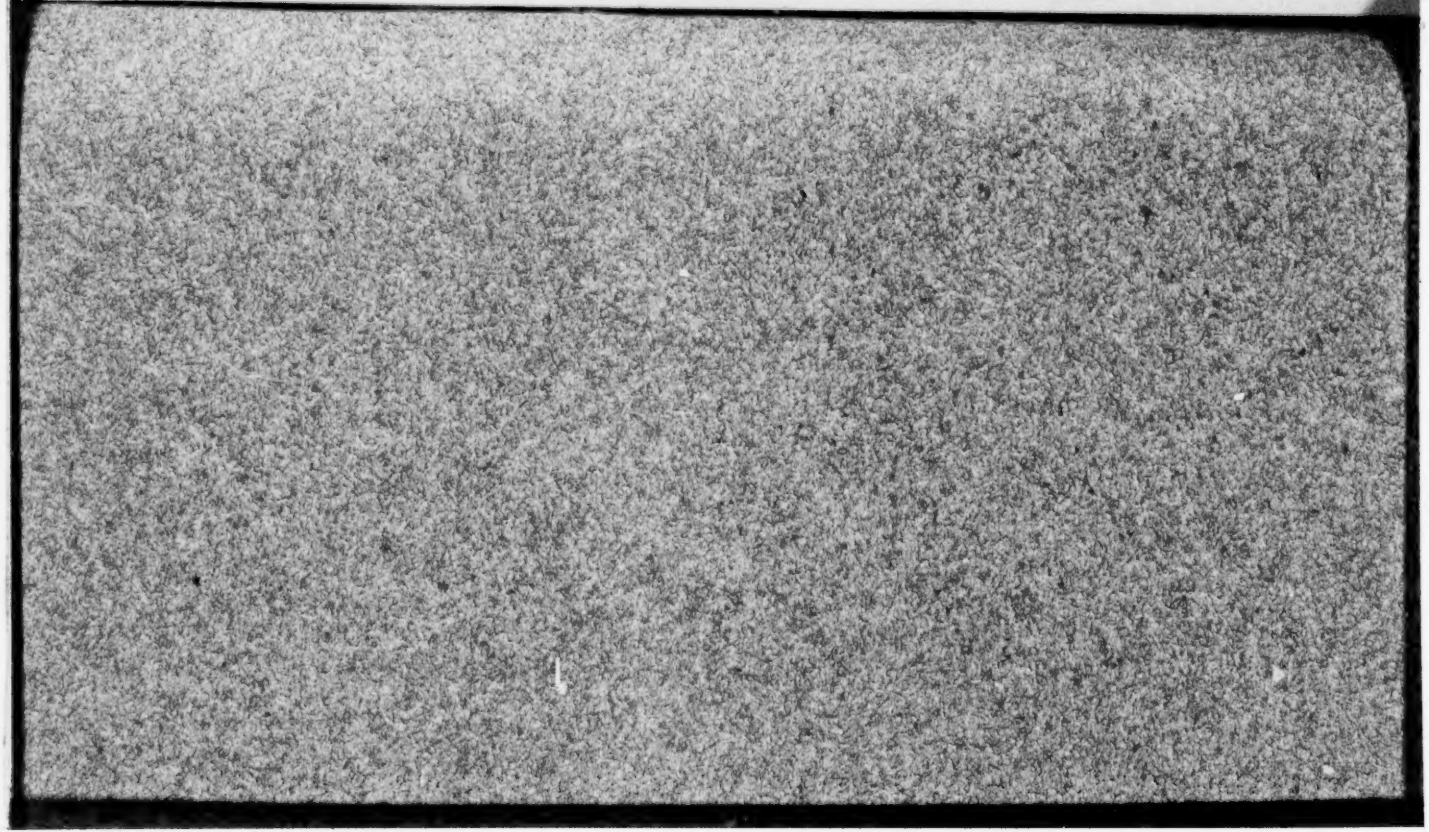
THE CLEVELAND ELECTRIC RAILWAY COMPANY,

APPELLEE.

Brief for The Forest City Railway Company.

D. C. WESTENHAVER,
Counsel for The Forest City Railway Company.

GARFIELD, HOWE & WESTENHAVER,
Of Counsel.



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Brief for the Forest City Railway Company.

The Cleveland Electric Railway Company filed its bill for the purpose of having declared null and void an ordinance passed by the City of Cleveland on the 11th day of January, 1904, and to enjoin any proceedings in the performance of it. This ordinance purported to grant the right to The Forest City Railway Company to maintain and operate a street railway on certain streets in the City of Cleveland. The right thereby conferred was to mature and become effective as of the 22nd day of March, 1905, at least so far as the occupancy and possession of the streets in question were concerned.

This ordinance, The Cleveland Electric Railway Company asserted, was a law of the State of Ohio, and was invalid for two reasons:

First: It impaired, if enforced, the obligation of certain pre-existing contracts made between the plaintiff and its predecessors in title and the City of Cleveland, by virtue of which the plaintiff was entitled to maintain and operate a street railway in the same streets to the 13th of July, 1913, or some still later date.

Second: It deprived, if enforced, the plaintiff of its property in its tracks, poles, wires and appliances, without due process of law.

Such proceedings were had that the Circuit Court for the Northern District of Ohio on the 4th of December, 1905, made a decree in which it was adjudged:

1. That the plaintiff's right to maintain and operate a street railroad on the street railway route in question expired on the 22nd day of March, 1905, and that the ordinance in question did not impair the obligation of any of the plaintiff's contract rights.

2. That the ordinance of January 11, 1904, purporting to grant the right to The Forest City Railway Company to maintain and operate a street railway in said streets was inoperative to confer on said Company any right to take the tracks, poles and wires and appliances of the plaintiff in and along said streets, as to do so would be the taking of the plaintiff's property therein without due process of law.

3. That The Forest City Railway Company be enjoined from interfering in any manner with the plaintiff in its peaceable possession of its said tracks, poles, wires and other appliances, and that the City of Cleveland be enjoined only from attempting to deliver possession of said tracks, poles, wires and other appliances to The Forest City Railway Company. (Record page 276.)

It is to this decree that the plaintiff below, The Cleveland Electric Railway Company, has prosecuted its appeal, assigning various grounds of error which may be summarized as follows:

1. It was error to adjudge and decree that the right of the plaintiff to operate its street railway upon the street railway route in question expired on the 22nd of March, 1905.

2. It was error to refuse to adjudge and decree that the ordinance of January 11, 1904, impaired the plaintiff's contract rights with the City, inasmuch as the plaintiff asserts that it was authorized by such contracts to maintain and operate the street railway upon said route until at least July 13, 1913.

3. It was error to refuse to adjudge and decree that the said ordinance of January 11, 1904, was null and void because it purported to renew to The Forest City Railway Company a grant, which at the time of said attempted renewal, belonged to the complainant.

The defendants below, The Forest City Railway Company and the City of Cleveland, have also prosecuted an appeal to the same decree assigning several grounds of error, which, however, may be briefly stated as complaining of the decree so far as it held the said Ordinance of January 11, 1904, was inoperative to confer upon The Forest City Railway Company a right to take the tracks, poles, wires and appliances erected and maintained by the plaintiff in said streets at the expiration of its franchise, and because it held that the provisions of said ordinance and the alleged acts of the defendants threatened to deprive the plaintiff below of its property therein without due process of law.

STATEMENT OF FACTS.

The street railway route in question was formerly owned by The East Cleveland Railroad Company. This Company was, on March 25, 1893, consolidated with The Broadway and Newburgh Street Railroad Company, creating by the consolidation, the plaintiff, The Cleveland Electric Railway Company.

The route in question is described as follows:

> "Commencing at the intersection of Prospect and Erie streets in the City of Cleveland; thence southerly on, over and along Erie street to Central avenue; thence easterly over Central avenue to Lincoln avenue; also commencing at the intersection of Quincy street and Willson avenue; thence over Quincy street to Woodland Hills avenue."

At the time some of the ordinances of the City of Cleveland were passed to which reference will be made, Central avenue from Erie street eastwardly to Brownell street was know as Ohio street, and from Brownell street eastwardly to the terminus thereof, it was known as Garden street.

The East Cleveland Railroad Company was incorporated in 1859. On November 1, 1850, July 3, 1860, and April 15, 1862, the Council of the City of Cleveland passed resolutions granting permission to this Company to construct, maintain and operate a street railroad which, when complete, extended from Water street eastwardly through Superior street to the Public or Monumental Square, through the Square and Superior street to Erie street; thence southerly in Erie street to Prospect street; thence eastwardly in Prospect street to Case avenue; thence northwardly on Case avenue to Euclid avenue; thence eastwardly on Euclid avenue to Willson avenue, at that time the city limits of the City of Cleveland.

This grant was for a term of twenty years from and after the 20th of September, 1859, and was subject to the conditions of a general ordinance in relation to street railroads passed September 20, 1859. (Record pages 182-4; 250.)

On July 23, 1862, the Trustees of East Cleveland township authorized the Company to construct and operate a street railroad eastwardly in Euclid avenue from the intersection of Willson avenue to what was then called Doan's Corners, and afterwards Fairmount street. The resolution of the Trustees fixed no time limit during which the road might be operated.

Subsequently various additional privileges were conferred, such as were necessary to double track the street railway and to extend it to points still farther east than Fairmount street, and to change the route through the Public Square; but this street railway route commencing at Water street and following Superior, Erie, Prospect, Case and Euclid has been ever since known as the Euclid avenue line, or the main line of The East Cleveland Railroad Company.

On January 14, 1868, the Council of the City of Cleveland adopted a resolution creating the street railway route, and authorizing the construction and operation of a street railroad thereon, now in dispute in this case, namely, the Garden Street or Central Avenue line.

The resolution granting permission to construct and operate recites that The East Cleveland Railroad Company had theretofore applied for leave

> "to construct a street railroad from the intersection of Prospect and Brownell streets to connect with the main line of its railroad; thence along the center of said Brownell street to its intersection with Garden street; thence easterly along the center of Garden street to and across Willson avenue to the easterly boundary of said City." (Record 188.)

The grant was made as an original and independent route after public notice and competition as to rate of fare.

The acceptance of this resolution by the Company describes the route as

> "A street railroad from their main track in Prospect street, through Brownell to Garden, and through Garden street to the easterly line of the city."

On March 30, 1868, the Council of the Village of East Cleveland passed an ordinance and also a resolution authorizing The East Cleveland Railroad Company to construct and operate a street railroad along the following streets in said Village, to wit:

> "Beginning at the termini of its branch road at the easterly line of the City of Cleveland in Willson avenue; running thence easterly in the center of Garden street to its intersection with the center line of Baden street; thence southerly on said center line to the southerly line of Wade street."

The ordinance, it will be noticed, does not fix any date for the expiration of the grant; but at the same time the Council adopted what it calls "preambles and resolutions," evidently intended to be a part of the ordinance or of the leave and permission given to the Street Railway Company. In these preambles and resolutions permission is given to operate the street railway for a period of twenty years from its completion, and the construction is to commence and to be completed within five years from the date thereof. (Record pages 189, 190.)

The Village of East Cleveland adjoined the City of Cleveland on the east, and the Garden street referred to in the last ordinance was physically a continuation of the Garden Street within the City of Cleveland. The Village of East Cleveland was annexed to the City of Cleveland shortly after this grant was made.

On March 25, 1873, the Council of the City of Cleveland, by resolution, gave leave to The East Cleveland Railroad Company

> "to connect their Garden street branch with the main line of their road at the intersection of Erie and Prospect streets, by laying double tracks from this point through Erie street to Ohio street, and through Ohio street to Garden street, and to remove their track from Brownell street between Ohio street and Prospect street."

This, it will be noted, was the substitution of a new route for the Garden street line, and a new point of intersection with the main line, and the part of the Garden street line on Brownell street was abandoned upon the substitution of this change of route. No date for the expiration of the permission given by this resolution is fixed; but Section 5 provides that all ordinances of the City of Cleveland now in force or that may thereafter be enacted shall apply to this grant. (Record, page 199.)

The general ordinances of the City then in force, provided that its provisions should apply to all grants to maintain and operate a street railway, and that no grant should be made for a longer period than twenty years from the date of each grant. (Record, pages 253, 254.)

On May 23, 1876, the Council of the City of Cleveland passed an ordinance entitled:

> "An ordinance to permit The East Cleveland Railroad Company to extend the Garden street branch of its road."

The extension thereby authorized was:

> "Along Garden street to Baden avenue, and along Baden avenue to Quincy street, and along Quincy street to New street, and along New street to Garden street; there to connect with the Garden street track; and to equip and operate said extension for twenty years in connection with said branch and its main line."

It was further provided that there should be no increase of fare on any part of its said branch or of its main line, or of said extension by reason of said extension. (Record, page 202.)

Previous to May 14, 1878, the statute law of Ohio contained no restriction on the length of the term for which the Council of the City might grant permission to a street railway company to occupy the streets of the city. Since that date, the restriction has been to a term of twenty-five years.

The power of the Council previous to 1878 was contained in an act passed April 10, 1861, 58 O. L., 66, and March 27, 1866, 63 O. L., 55. A provision common to all the legislation on the subject previous to 1878 is contained in Section "5" of 58 O. L., 67, and is as follows:

> "Sec. 5: That hereafter no street railroad shall be constructed or commenced until the consent of the City Council or corporate authorities of the city, town or village wherein such road is to be constructed shall have been first obtained; and it shall be competent for the City Council or corporate authorities of any city, town or village to agree with any street railroad company organized in pursuance of this act, or with any individual or company of individuals desiring to construct a street railroad in said city, town or village upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals shall construct and operate a street railroad in said city, town or village."

The general ordinance of the City of Cleveland passed September 20, 1859, and subject to which the original line of The East Cleveland Railroad Company was constructed contained the provision that no contract should be for a longer period than twenty years from the date of the passage of that ordinance. (Record, page 252).

A similar provision is found in the general ordinances

of the City of Cleveland passed December 4, 1866, and March 12, 1877, which continued in force until after the Legislature imposed the restriction already mentioned. (Record, pages 256, 260.)

On June 12, 1879, 79 O. L., page ——, the Legislature passed an act authorizing councils of municipalities to renew any grant previously made

> "at its expiration upon such conditions as may be considered conducive to the public interests,"

On September 8, 1879, The East Cleveland Railroad Company applied for a renewal

> "of the grant and license heretofore made and issued to said Company for the use and occupancy of the several streets in and through which said Company's tracks are now laid and its said road is now operated."

The petition represents that the original grant

> "was for a period of twenty years as then fixed by law and by the provisions of a general ordinance passed September 20, 1859."

On September 15, 1879, the Council of the City of Cleveland passed an ordinance entitled:

> "An ordinance granting a renewal of franchise to The East Cleveland Railroad Company to construct, maintain and operate a street railroad in and through certain streets of the City of Cleveland."

The ordinance authorized the Company

> "To re-construct, maintain and operate its double track street railroad, with the necessary switches and turn-outs and turn-tables as heretofore constructed and now maintained and operated in the City of Cleveland, commencing on Superior Street at the intersection of Water Street; thence through Superior Street to and around the southwest corner of Monumental Square to Euclid Avenue; thence

through said Avenue to Erie Street; then through said Erie Street to Prospect Street; thence through Prospect Street to Case Avenue; thence through said Case Avenue to Euclid Avenue; thence through and along Euclid Avenue to Willson Avenue."

It will be noted that no part of the territory covered by the Garden Street line or route or branch, whatever it may be called, is included in the renewal; also that no part of the Euclid Avenue line or the main line, whichever it may be called, east of Willson Avenue is included. The renewal itself was for a period of twenty-five years from the 20th day of September, 1879, making the same expire on the 20th day of September, 1904. (Record, page 204-207.)

Afterwards on the 4th day of April, 1883, the Council of the City of Cleveland, passed another ordinance entitled:

"An ordinance granting to The East Cleveland Railroad Company the right to extend, lay and operate its double track in Euclid Avenue from the west line of Willson Avenue to the west line of Fairmount street."

It was provided by Section "3":

"That the right of said Company to have and operate its said railroad on said Euclid avenue between the west line of Willson avenue and the city limits shall terminate on the 20th day of September, A. D. 1904, with the said renewal of that part of said Company's line lying west of said Willson Avenue."

Thus it will be seen that by these two renewal ordinances, one passed in 1879, and the other April 4, 1883, the right to construct, maintain and operate the Euclid Avenue line or main line from Water Street to Fairmount Street was conferred upon the Company; that the date of expiration for the street railway on the streets or the route therein described was fixed as the 20th of Sep

tember, 1904; that as to this main line the renewal grant was made as to one part at one time and as to another part at another time, and in two separate ordinances, and that neither ordinance included any part of the Garden Street line, route or branch, or any of the streets covered thereby. (Record, page 209.)

On March 22, 1880, in the interval between the passage of the two ordinances referred to, the Council of the City of Cleveland passed another ordinance entitled:

> "An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its railway."

By this ordinance, The East Cleveland Railroad Company was authorized:

> "to extend the Garden street branch of its railway from the present track at the intersection of Baden avenue and Quincy street in an easterly direction on and along the said Quincy street to the intersection of Lincoln avenue, and to equip and operate the said extension and its Garden street branch for the period of twenty-five years from and after the passage of this ordinance." (Record, page 208.)

This is the ordinance which the City of Cleveland and The Forest City Railway Company contend, is the foundation of The Cleveland Electric Railway Company's right to maintain its Central Avenue or Garden Street line. It is not contended by anybody that there was any express renewal of the right to operate the Garden Street line made at any subsequent date; and it is contended that none of the ordinances subsequently passed by the Council furnishes any basis for the assumption that the date of expiration has been expanded by inference or implication.

This ordinance was vigorously litigated in the Courts of Ohio, and it was held that this ordiance operated as a surrender by the Company of its antecedent grant on the territory thereby covered and a renewal to the Company for a

term of twenty-five years. (Record, page 168.)

State v. East Cleveland R. R. Co., 6 C. C., 318.

On February 9, 1885, the Council passed an ordinance entitled:

> "'An ordinance to permit The East Cleveland Railroad Company to extend the Garden street branch of its railway."

This ordinance authorized the Company,

> "to extend the Garden street branch of its railway from the termini of its present track at the intersection of Quincy street and Lincoln avenue in an easterly direction on and along Quincy street to Woodland Hills avenue, and to equip and operate said extension * * * in connection with said branch and its main line, and terminating with the grant for the main line; but with the express condition that no increase of fare shall be charged by said Company on any part of its main line or on said extension by reason of said extension." (Record, page 211.)

This is the grant for the Company's line in Quincy street east of Lincoln Avenue. The ordinance as printed on page 211 omits the words "and terminating with the grant for the main line"; but both bill and answer in pleading this ordinance aver that these words are contained in it, and the fact is admitted that the original ordinance contains these words. The opinion of the court below so quotes it. (Record, pages 117, 168.)

On June 18, 1887, the Council of the City of Cleveland passed an ordinance entitled:

> "An ordinance to permit The East Cleveland Railroad Company to extend the Garden street branch of its railway."

This ordinance authorized the Company

> "to extend the Garden street branch of its railway

> from the intersection of its present track with Baden avenue upon Garden street in an easterly direction along and upon Garden street to the easterly line of Lincoln avenue, and equip and operate said extension * * * in connection with said branch and its main line, and terminating with the grant for the Garden tsreet main line, but with the express condition that no increase of fare shall be charged by said Company on any part of its main line or on said extension by reason of said extension." (Record, page 217.)

On July 14, 1888, the Council of the City of Cleveland passed an ordinance entitled:

> "An ordinance granting to The East Cleveland Street Railway Company the right to construct and operate an electric street railway on Euclid and Cedar avenues."

This ordinance granted permission to erect and maintain poles and wires and the necessary appliances and fixtures for conducting currents of electricity to propel and operate cars upon the following named streets in said city, to-wit:

> "Euclid avenue from Willson avenue easterly to the city limits; Cedar avenue from a point near the Cleveland and Pittsburg Railroad Company's right of way in said avenue easterly to a point about 1500 feet east of Fairmount street."

It will be noted that such parts only of the Euclid Avenue or main line as were east of Willson Avenue, and such of the Cedar Avenue line as was east of The Cleveland & Pittsburg Railroad Company's right of way were included in this ordinance, so far as it authorized or required equipment by electricity; but Section "8" provided that whenever the Council should require, the Company should use the same system as herein provided on the entire length of their main and Cedar Avenue line.

Section "6," however, provided as follows:

"Sec. 6. The privilege of constructing the electric system and the operation of its lines, as hereinbefore provided, is granted in consideration of the improved facilities hereby contemplated and the large expenditure necessary to secure the same, and shall be in force for a period of twenty-five years from and after the date of the passage of this ordinance upon its main and Cedar avenue lines, but nothing herein shall be so construed as to authorize any increase of present fares for transportation over any portion of said company's lines; Provided, that if the said East Cleveland Railroad Company shall, by said electrical system, fail to provide a mode of transit which shall be deemed satisfactory to the Board of Improvements, or if, from any cause, said company shall fail to extend the said electrical system over their entire main and Cedar avenue lines within eighteen months from date of passage of this ordinance, then said ordinance shall be null and void so far as it relates to extension of charter." (Record, pages 219-221.)

The Council by resolution adopted May 13, 1889, required the Company to extend its electrical equipment over its main and Cedar Avenue lines to the westerly termini thereof, and the Euclid Avenue line from Water Street easterly to Willson Avenue and the Cedar Avenue line to its intersection with the Euclid Avenue line was equipped with electricity in accordance with the provision of the ordinance of July 14, 1888, and of this resolution.

It will be again noted that no part of the route or streets referred to in the various ordinances as the Garden Street branch, or the Garden Street main line, or the Garden Street route, was included either in this ordinance or resolution or in the equipment erected and installed in compliance therewith.

On March 10, 1890, the Council of the City of Cleve-

land passed another ordinance entitled:

> "An ordinance granting to The East Cleveland Railroad Company the right to substitute electric motive power for horse power upon its Garden Street branch."

This ordinance authorizes the Company

> "to operate its Garden street branch by electricity, *i. e.*, from the intersection of Prospect and Erie streets, along Erie street to Ohio street, along Ohio street to Brownell street, along Brownell street to Garden street, and along Garden street to Lincoln avenue; also along New street from Garden street to Quincy street, and along Quincy street to Woodland Hills avenue, and authority is hereby granted said Company to erect and maintain on said streets all necessary poles and wires, and the necessary appliances and fixtures for the conducting of electric currents to operate by electric power the said Garden street branch during the term of its present grant for said Garden street branch." (Record, page 225.)

On March 30, 1891, the Council of the City of Cleveland passed another ordinance entitled:

> "An ordinance to grant to The East Cleveland Street Railroad Company the right to construct and operate a second or additional track on Central avenue from the east line of Willson avenue to the right of way of The Cleveland and Pittsburgh Railroad Company."

The ordinance authorized the Company

> "to lay and operate a second or additional track in and upon Central Avenue from the east line of Willson avenue to The Cleveland and Pittsburg Railroad tracks, and to connect said tracks herein authorized with the tracks now in and upon Central avenue at Willson avenue and at the Cleveland and Pittsburg railroad tracks."

Garden street had, before the passage of this ordinance,

been changed to Central Avenue. The ordinance further provided:

> "The right herein granted shall be valid until the expiration of the grants for the said Company's main line." (Record, page 227.)

On April 20, 1891, the Council of the City of Cleveland passed another ordinance entitled:

> "An ordinance to grant to The East Cleveland Railroad Company permission to lay an additional or second track in Quincy street from New street to Woodland Hills Avenue."

The ordinance authorized the Company

> "To lay and operate a second or additional track in and upon Quincy street form New street to Woodland Hills Avenue, and to connect the tracks herein authorized with the tracks now laid upon New street as per plat accompanying the petition of said Company."

The ordinance also contained a further provision:

> "The right herein granted shall be valid until the expiration of the grants of said Company's tracks on said Quincy street east of Lincoln avenue, to-wit, July 13, 1913." (Record, page 228.)

On May 22, 1893, The Cleveland Electric Railway Company sent a cummunication to the Council of the City of Cleveland. In this communication it advised the Council that The Cleveland Electric Railway Company was organized on the 25th day of March by the consolidation of The East Cleveland Railroad Company and The Broadway and Newburg Street Railway Company; that on the 24th day of April, 1893, it was further enlarged by consolidation with The Brooklyn Street Railroad Company and The South Side Street Railroad Company. The Council is advised by the Company that it believed these consolidations to be legal, and that they were made under advice of counsel; but inasmuch as some question had arisen as to the intention of the Company, it stated officially that it did not claim any rights greater

than the constituent companies forming the organization; that it intended to obey the ordinances to which each and all of the constituent companies were subject; that it had since the consolidation issued transfer checks to all persons desiring them to enable such persons to have a continuous ride from any east side line to any south side or west side line, and from any south or west side line of the Company to any east side line for one fare, and would continue such system of transfers where it cannot better accomodate its patrons by establishing through lines, and that it disclaims any intention of charging more than one fare for any such continuous ride. (Record, page 230.)

On May 29, 1893, the City Council passed a resolution consenting to the consolidation on condition that only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any of the constituent companies within the limits of the city, and that passengers on any of such lines paying one fare shall be entitled without extra or additional charge to be transferred to any other of said lines and have a continuous ride thereon for said single fare. (Record, page 230.)

The lines of The Broadway and Newburgh Street Railway Company were at the time of the consolidation limited to expire July 1, 1914. Those of The South Side Street Railroad Company were limited to expire July 13, 1913. Those of The Brooklyn Street Railroad Company were limited to expire January 26, 1910.

(See Supplemental Record.)

The only extension of any part of the tracks of the Garden street or Central avenue line occurring after the consolidation was by ordinance passed June 25, 1894. It is entitled:

> "AN ORDINANCE granting to The Cleveland Electric Railway Company the right to operate and extend its double track street railroad in Quincy

street from New street to Willson avenue."

It grants permission

> "to extend, maintain and operate by means of electricity as a motive power its double track street railroad on and along Quincy street from its present tracks therein westerly to Willson avenue connecting by curves with its Willson avenue tracks."

It was further provided that

> "This grant shall terminate with the grant for said Company's present line in Quincy street. (Record, page 239.)

In consideration of this extension, the Company surrendered its tracks hitherto maintained in New street connecting Garden street or Central avenue with Quincy street.

On February 19, 1894, the Council passed an ordinance creating what is known as the Willson avenue cross-town line. And it is from this ordinance and its provisions that the plaintiff below asserts a right to maintain all of its lines in the City to July 1, 1914, is implied. (Record, pages 235, 238.)

It is entitled:

> "AN ORDINANCE granting permission to The Cleveland Electric Railway Company and The Cleveland City Railway Company to extend their tracks in Willson avenue."

As appears from the ordinance, The Cleveland City Railway Company had tracks in said avenue for a part of the distance, and The Cleveland Electric Railway Company for other parts of the distance. The ordinance authorized both companies jointly to connect the gaps and to extend northwardly to the terminus of Willson avenue.

Section "6" thereof from which prolongation is inferred of the life of all intersecting street railway lines is as follows:

"Sec. 6: A passenger on any car operated on any part of said Willson avenue, on payment of one fare, either in cash or by ticket, shall be entitled, without additional or extra charge, to be transferred to any other line of either of said companies, intersecting or coming to said Willson avenue, including the lines on Broadway, and to have a continuous ride thereon, with the right, without additional or extra charge, to be transferred from such second line to a car on any other line of the company operating the same which crosses the Cuyahoga river, and passengers on any line of either of said companies intersecting or coming to said Willson avenue, including the line on Broadway, shall be entitled, without additional or extra charge, to be transferred to said Willson avenue line and to have a continuous ride thereon. The Council shall at all times have the right to prescribe rules and regulations in respect to the transferring of passengers as provided for in this section." (Record, pages 235-238.)

The Cedar avenue line of The East Cleveland Railroad Company was created by ordinance passed March 6, 1882. (Record, page 261.)

It was established and constructed as an extension of the Euclid avenue or main line of the Company. It was to terminate with the grant for said main line.

On July 21, 1884, and on September 9, 1887, and on February 24, 1888, and on October 13, 1890, further extensions of the Cedar avenue extension were authorized; but each and all of these ordinances expressly follow the language of the original Cedar avenue extension and expressly provide that they shall terminate with the grant for the main line from which the Cedar avenue extension was projected. This date, as we have already seen, was fixed by the ordinance passed July 13, 1888, as twenty-five years from and after that date. (Record, pages 263, 264, 266 and 267.)

The Wade Park line of The East Cleveland Railroad Company was created by ordinance passed April 12, 1889. It was passed as an ordinance authorizing an extension of the Euclid avenue or main line from the intersection of Euclid and Case avenues; and it is expressly limited to expire with the present grant for the main line. (Record, pages 269, 270.)

In consequence of the consolidation of the several companies into The Cleveland Electric Railway Company, and of the passage of the ordinance authorizing the extension on Willson avenue, it was contended below that an entire system had been created by the Council, and that the Council had fixed a uniform date for the expiration of all of the franchises previously granted to the constituent companies and then owned or subsequently acquired by The Cleveland Electric Railway Company, and that the date thus fixed was the date of the last expiring franchise, namely, July 1, 1914, the date of the Willson avenue extension.

The record, however, shows that since such date, the Council has passed a number of ordinances which have been accepted by the plaintiff, and also others which were accepted by The Cleveland City Railway Company fixing other and different dates of expiration.

Among these is an ordinance passed August 8, 1901, authorizing an extension of track from Euclid avenue along the east side of the Public Square to Superior street, in which ordinance it is provided:

"This grant shall expire March 22, 1905."

(Record, page 241.)

Again on June 23, 1902, the Council passed an ordinance authorizing The Cleveland Electric Railway Company to extend its tracks on Erie street from Euclid avenue to St. Clair street, and from Scovill avenue to Woodland avenue which was accepted by the Company. This ordinance also provides:

"That the grant thereby made shall expire March 22, 1905." (Record, page 244.)

In addition to these, there are six other ordinances passed at different times by the Council of the City of Cleveland, and accepted by the plaintiff below or The Cleveland City Railway Company authorizing it to extend its tracks on various streets, all of which are limited to expire on the 22nd of March, 1905.

(See Supplemental Record.)

On or about the first of July, 1903, the plaintiff acquired by purchase, the Council of the City of Cleveland in no manner consenting thereto, all the franchises and street railway lines of The Cleveland City Railway Company. The Cleveland City Railway Company was formed by the consolidation of The Cleveland City Cable Railway Company and The Woodland Avenue & West Side Street Railway Company. The former was operating what was known as the St. Clair street, the Payne avenue and the Superior street lines, under franchises, all of which expire on the 26th of January, 1910.

(See Supplemental Record.)

The Woodland Avenue and West Side Street Railway Company was the owner of the franchise and operating the street railway lines involved in the litigation under review in this Court in the case of *Cleveland vs. The Cleveland Electric Railway Company*, 201 U. S. ,529, and unless extended to a later date in consequence of the matters urged in this litigation, expire on the 10th day of February, 1908.

As already stated, on the 11th of January, 1904, the Council of the City of Cleveland granted to the defendant, The Forest City Railway Company, permission to maintain and operate a street railway on the streets, commencing at the intersection of Prospect and Erie, and including all the territory covered by the Garden street branch or line. If, as

contended by the plaintiff below, its franchises did not expire till a later date, then this ordinance, it is said, impairs the obligation of its contracts, because it purports to give to The Forest City Railway Company the right to maintain and operate a street railway from and after the 22nd of March, 1905.

The other matters involved in this ordinance and in the pleadings bearing on the question of whether or not its provisions, if enforced, would deprive the plaintiff below of any of its property without due process of law, will be stated hereafter when that question is being discussed in connection with the cross appeal prosecuted by the defendant below.

The foregoing is a full review of all of the legislation of the Council of the City of Cleveland, so far as it relates to the Garden street or Central avenue line. There are a number of ordinances in the record dealing with extensions of the Euclid avenue or main line that have not been specifically mentioned because they do not apparently bear on any question to be considered.

Argument.

I.

THE PLAINTIFF'S CONTENTIONS.

The plaintiff in the Court below based its right of relief, so far as the ordinance of January 11, 1904, was alleged to be an impairment of its contract rights, on several grounds which, we think, may be fairly stated as follows:

1. Prior to 1878 the Legislature of Ohio had imposed no limit on the length of time for which permission might be given to operate a street railway, and, therefore, the ordinances and resolutions of the City of Cleveland and the Village of East Cleveland so far as they limited the grants thereby made are void as to the limitation; and the right thus acquired continues during the corporate life of the grantee which, if not perpetual, continues until annulled by the Legislature. And the grants made by such ordinances and resolutions when not limited continue during the corporate life of the grantee.

2. By reason of the merging of all the street railway companies in one, either by consolidation or purchase under the statutes of Ohio, with the requirement that a passenger shall for one fare have a continuous ride in the same general direction over all the lines with certain transfer rights, to enable him to do so, a unified system of street railways was created, and the right to operate all and every part of the system expires at the same date, and that date is the date of the franchise or extension grant last expiring.

3. Because of the obligations imposed by the ordinance of February 19, 1894, authorizing the plaintiff and The Cleveland City Railway Company to extend their respective tracks in Willson avenue, and especially because of the obligations imposed by Section "6" requiring transfers at

intersections, a right arises corresponding to the duty imposed, and since the right of operation conferred by this ordinance purports to continue until July 1, 1914, and the duty of transferring at the Garden street or Central avenue intersection also continues to that date, the right to operate the latter line is, by implication, extended to the same date.

4. The Garden street or Central avenue line is to be regarded as an extension of the main line of The East Cleveland Railroad Company, and expires on July 13, 1915, the date expressly fixed for the expiration of that line; or in any event whether it be regarded as an extension or as an independent line, the date of expiration is in consequence of certain ordinances granting the right to lay additional tracks or to extend tracks in Garden street or Central avenue, prolonged beyond March 22, 1905, the date originally fixed for its expiration, and continues until July 13, 1913.

II

STATUTE LAW OF OHIO.

All of the statute law of Ohio to which reference is made in the course of this argument is, for convenience, printed consecutively in an appendix. Its force and effect, therefore, will only be briefly stated in this connection.

During all the time covered by the transactions in this case, Section 2640 (1536-31) of the Revised Statutes was in existence. This section read in connection with Sections 2601 (1536-66) and 2501 (1536-184) shows that the State in its sovereign character has reserved no property interests in the streets; but the title therein as well as the control over the same has been vested in the municipalities.

Cincinnati Street R. R. Co. vs. Smith. 29 O. S., 643.

The State, while reserving to itself the power of conferring corporate life, has at all times referred street railway

corporations to the municipalities to obtain those privileges or easements in the streets necessary to operate a street railway therein. Section "5," 58 *O. L.*, page 66, was enacted April 10, 1861, and it has in one form or another been continuously in force ever since. And it empowers municipalities to agree with street railway companies on the terms and conditions under which they shall use and occupy the streets.

While plenary power to fix the conditions upon which street railways may be constructed and operated is delegated to the municipalities, certain restrictions have been imposed upon the manner of exercising that power.

Section 2501 R. S. (1536-184) provides, that before any work shall be done in the construction of a street railway, application for leave so to do shall first be made to the Council in writing; that the Council shall prescribe the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys that shall be used and occupied therefor. This proceeding is what is known as establishing a street railway route, and has been the law in one form or another since the act passed in 1866, 63 O. L., page 55.

Section 2502 R. S. (1536-185) provides that no ordinance or resolution shall be passed as provided in Section 2501 to establish or define a street railway route, and no action shall be taken by the Council to invite proposals to construct and operate such railroad until three weeks' public notice shall have been given by advertisement. It also provides that the grant shall be made to the person who will agree to carry passengers at the lowest rates of fare; also that there shall have been previously obtained the consent in writing of a majority of the abutting property owners. This has always been in force since 63 O. L., page 55.

These are the proceedings necessary to the making of an original grant for a street railway as distinguished from a renewal of a grant previously made or from an extension of

the tracks of an existing street railway. The public advertisement and the competition as to the rates of fare and the prescribing of the streets and alleys and the terms and conditions, are the distinguishing features of an original street railway grant.

Previous to May 1, 1869, no provision had been made by statute empowering the Council to authorize an extension of the tracks of an existing street railway. On that date, an act was passed which is now Section 2505 R. S. (1536-188). It provides:

> "The Council of any city or village may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad, to extend their track * * * when the Council may deem such extension beneficial to the public."

It is further provided that when any such extension is made

> "the charge for carrying passengers on any street railroad so extended and its connections made with any other road or roads by consolidation under existing laws shall not be increased by reason of such extension or consolidation."

The act passed early in 1866, 63 O. L., page 55, has already authorized the consolidation of street railways where their lines connected or might be made to connect.

The written consents of property owners was first required by the act of 1866, and has been the law continuously in one form or another ever since, and applies both to original grants and to track extensions.

Prior to June 12, 1879, no express provision had been made by statute for the renewal of an existing grant, although it had been held that the right to grant included the right to renew; but it was still uncertain what part of the proceedings necessary to be taken in making an original grant had to be

followed in making a renewal of a pre-existing grant.

Haskins vs. Street Railway Co., 4 Law Bull, page 1126.

To meet this situation, on June 12, 1879, Section 2501 was amended by providing that such grant may be renewed,

> "at its expiration upon such conditions as may be considered conducive to the public interest."

It has since been held, and has become the accepted practice that renewals may be made without public advertisement, or competition as to the rate of fare.

Previous to 1878, the Legislature had placed no restriction on the length of term for which the Council might grant the leave and permission to maintain and operate a street railway. In that year, Section 2502 was amended by providing that no grant should be valid for a longer term than twenty-five years, and this was later amended to include renewal grants. At the same time, this section was also amended so as to prohibit the Council from releasing the Grantee during the term of the grant from any obligation or liability imposed thereby.

Section 2505-a R. S. (3443-15) empowers any corporation or company organized for street railway purposes to lease or purchase any other street railroad, including its franchises. The consent of the Council of the city is not made necessary to the validity of such lease or purchase. Nothing is said in this or any other section as to transfer privileges from one line to another so acquired; but it is provided

> "the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation shall not exceed the maximum fare over any one of said lines prior to such lease or purchase."

This was first enacted in the year 1888 (88 O. L., 493).

Section 2505-b R. S. (3443-16) provides that whenever the line of street railway companies as constructed or in process of construction, connect or can be made to connect with one another, they may consolidate themselves into a single company merely by corporate action of the two separate companies. This may be done against the dissent of the Council of the municipality.

Section 3382 R. S. provides that the effect of such consolidation shall be to vest all the rights, privileges and franchises of the constituent company in the new company subject to all the restrictions, disabilities and duties of each of the constituent companies.

Section 1694 R. S. (1536-64) provides that no ordinance or by-law of a municipal corporation shall contain more than one subject which shall be clearly expressed in its title, and that no ordinance shall be amended unless the new ordinance contain the entire ordinance or section revived or amended; and the ordinance or section so amended shall be repealed. The requirements of this section have been uniformly held by the Supreme Court of Ohio to be mandatory and not merely directory.

Elyria vs. Elyria, 57 O. S., 374;
Campbell vs. Cincinnati, 49 O. S., 463;
Bloom vs. Xenia, 32 O. S., 461.

From the foregoing review of the state legislation, it will appear that the Legislature has fully vested all proprietary interest in the streets in the municipalities, and has fully empowered the constituted authorities of the municipality to deal with the same as the owner thereof, and as such to agree with street railway companies on the terms and conditions under which the same may be used.

It further appears that a certain fixed and definite contract between the city and the street railway company is provided both as to an original grant or as to a renewal

grant. The public shall be given due notice of the pendency of the proceedings for the establishment of a street railway route, and the making of a street railway grant; the length of the term is limited and the change of those terms so far as obligations are imposed upon the Grantee is forbidden. Whether for a valuable consideration those obligations may, during the term be changed, is not important; the fact remains that a certain enduring permanency was provided as to a grant once made, and a change of its terms is not to be inferred on slight grounds. The Council having once entered into a solemn grant with all due formality, the citizens have a right to rest quietly in the faith, that its terms will not be affected by ordinances dealing with other subjects and intended to accomplish other objects. A nullification or change of those terms are not, we shall insist, to be inferred from ordinances authorizing merely the extension of tracks, the consolidation of existing lines, or dealing exclusively with other subject matter.

III

RULES OF CONSTRUCTION.

That the rules of construction so vigorously announced by the learned Judge who decided the case below are sound, has recently been decided in this Court. The notion, however, that they are meaningless, verbal formulas still permeates the argument of opposing counsel.

As was said by Mr. Justice Black in *Railroad Company vs. Canal Commissioners*, 21 Pa. St., 22, the Court "seems not to have made much impression upon the professional mind."

The rules of construction, as announced and applied by the Court below, were summarized by this Court in the case of *Blair vs. Chicago*, 201 U. S., 400. At page 471, of the opinion, the Court say:

"Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce on Railroads, 491; *New Orleans, etc. Railroad Co. vs. City of New Orleans,* 34 La. Ann., 429, 447. "Words of equivocal import," said Mr. Chief Justice Black, in *Pennsylvania Railroad Company vs. Canal Commissioners,* 21 Pa. St., 9, 22, "are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature." "The just presumption," says Cooley in his work on Constitutional Limitations, 7th ed., page 565, "in every such case is that the State has granted in express terms all that it designed to grant at all;" and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: "This is sound doctrine and should be vigilantly observed and enforced."

"Since the decision of the *Dartmouth College Case,* 4 Wheat., 518, this Court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the State or municipalities acting under state authority. Concurrent with this principle and to be considered when construeing an alleged grant of this character is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public prop-

erty, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of *Charles River Bridge vs. Warren Bridge,* 11 Pet., 420, and has been uniformly applied in many subsequent cases in this Court. In *Perrine vs. Chesapeake and Delaware Canal Compnay,* 9 How., 172, 192, the same eminent Chief Justice, speaking for the Court, said: 'The rule of construction in cases of this description * * * is this—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of *The Binghamton Bridge,* 3 Wall., 51, 75, it was said: 'The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'

"This principle has been declared axiomatic as a doctrine of this Court. *Fertilizing Company vs. Hyde Park,* 97 U. S., 659, 666. In *Slidell vs. Grandjean,* 111 U. S., 412, 438, it is declared a wise doctrine, 'it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies.' Among other cases affirming the principle in this Court is *Coosaw Mining Company vs. South*

Carolina, 144 U. S., 550, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the State. Many of the cases are cited in a note to *Knoxville Water Company vs. Knoxville*, decided at this term. 200 U. S., 22, 34."

In *Knoxville Water Company vs. Knoxville*, 200 U. S., at page 34, of the opinion, this Court says:

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

The foregoing decisions are so recent and cover the case so comprehensively that it would be a labor of supererrogation even to cite other authorities, much less to quote from them.

IV

THE INDETERMINATE FRANCHISE CLAIM.

This position was strongly insisted upon in the Court below. Not having seen the brief of opposing counsel, we do not know if, in view of the decision of *Blair vs. Chicago*, this claim is still relied on; but we submit that the present contention is disposed of adversely to the plaintiff in that case.

The theory as announced was that the franchise of The East Cleveland Railroad Company was derived from the State, including the right to construct and operate a

street railway in the streets of the city designated in its corporate charter; and that the function of the Council of the municipality consisted merely in designating the streets to be occupied and to regulate and fix the administrative and police features of the use. Therefore, the act of the Council of the City of Cleveland or of the Village of East Cleveland in attempting to fix a term for the duration of such use was in excess of the power conferred and in derogation of the franchise derived directly from the State; and was, consequently, null and void; and it was further said that this right of indeterminate duration obtained prior to 1878 was not extinguished by the acceptance thereafter of renewal franchises for the same streets, because there was no express surrender in the new contract of all pre-existing rights.

The opinion of the Court below renders unnecessary any extended discussion of this proposition.

The same argument was made in *Blair vs. Chicago.* The delegation by the Legislature of Illinois to the City of Chicago of control over its streets and of power to fix the terms and conditions for the use of those streets for street railway purposes was made in language very like that used by the Legislature of Ohio, and already quoted. The exclusive control of the streets was vested in the city; the street railway companies were obliged to obtain the consent of the city before using the streets.

In the opinion of the Court, at page 457, it is said:

> "A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority,' Webster's Dict.; 'To give legal power to,' Century Dict. It is an additional grant of right and power which the legislature re-

quires the corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute, excluding the authority and reserving its exercise to the State, necessarily includes the right to fix the time for which the streets may be used. This doctrine was, we think, correctly stated by Judge Lurton, in delivering the opinion of the Court of Appeals in *Louisville Trust Company vs. Cincinnati*, 76 Fed. Rep., 296, 308. 'The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enters into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant.'"

The case of *Louisville Trust Company vs. Cincinnati*, 76 Fed. Rep., 296, cited with approval in the foregoing case, arose under the laws of Ohio which we are now considering; and is, we submit, conclusive of this case.

The case of *State ex rel. Taylor vs. Columbus Railway Company*, 24 O. C. C., 609, sustains the right of the city under its power to agree with the street railway company on the terms and conditions of the use, to fix a period for the duration of the use.

That the power to agree on terms and conditions for the use of the streets implies the right to agree to the duration of the use, and sustains the power of the municipality to impose as one of the terms, a right to acquire the property of the Grantee when the city shall have the power in the future so to do, is sustained by the decision of this Court made on October 29, 1906, in the litigation between the City of Indianapolis and the Gas Company.

As already indicated, Section "5" of the act passed in 1861 by the Legislature of Ohio conferred on the city in the broadest terms the right to agree with street railway companies on the terms and conditions for the use of the streets. This, we have seen, carries with it the right to fix the duration of such use. In one form or another this has been the law ever since, and with the exception of the first three resolutions passed respectively November 1, 1859, June 5, 1860, and July 3, 1860 (Record, pages 182, 183, 184), all the ordinances and resolutions conferring rights on The East Cleveland Railroad Company were passed after the adoption of this law. In point of fact, the City of Cleveland never at any time gave permission to use its streets for an indeterminate period.

The general ordinance passed September 20, 1859, provided, that any company organized for the purpose of operating a street railway in the city, should be governed by the conditions therein expressed. Among those conditions was one providing that no contract under the provisions of that ordinance should be made for a longer period than twenty years from the date of the passage of this ordinance. (Record, pages 250-252.) These provisions of the general ordinance have ever since been a part of the general street railway ordinances of the City of Cleveland.

The three ordinances last referred to, being those first passed conferring any rights on The East Cleveland Railroad Company, are expressly limited to a term of twenty years and are made subject to the provisions of this ordinance.

The only ordinance of the City of Cleveland which does not fix a specific date is that passed by the Council of the City of Cleveland on March 23, 1873. (Record, page 199.) Before its passage The East Cleveland Railroad Company had been granted permission to construct and operate its Garden street branch. This branch intersected with the main line or Euclid avenue line at the intersection of Brow-

nell and Prospect streets. It was expressly limited to a term of twenty years from and after the 20th day of March, 1868. This ordinance of March 23, 1873, merely permits the removal of the track from Brownell street and changes the route for the Garden street line so as to connect at Prospect and Erie. Manifestly it is controlled by the provisions of the original grant for the Garden street line, and in addition thereto Section 5 provides as follows:

> "The ordinances of the city now in force or that may hereafter be enacted for the government and regulation of street railways shall apply to this grant the same as to the other portions of said East Cleveland Railroad tracks."

It cannot, therefore, be maintained even as to this ordinance that the limitation was omitted.

That part of the Garden street or Central avenue line originally authorized by the Village of East Cleveland by ordinance of March 30, 1868, it is said, was for an indeterminate period. The ordinance itself (Record, page 189) does not limit its duration; but on the same date, at the same meeting, and evidently as a part of the same ordinance, there was adopted preambles and resolutions which limit the permission to operate to a period of twenty years from the completion of the street railway and required it to be completed within a period of five years from that date. It was also constructed as a part of the Garden street line and was obviously intended by the Council of East Cleveland to be controlled by the duration of the Garden street grant.

As to the Euclid avenue and main line, the resolution of the Trustees of East Cleveland Township, passed August 9, 1862 (Record, page 187), does not fix the duration of the grant. This is for a single track on the south side of the road between Willson avenue and Doan's Corners, afterwards known as Fairmount street. This section is the only part of the Euclid avenue line as to which it can be asserted the

permission was indeterminate.

But whatever may have been the contract relations between The East Cleveland Railroad Company and the City of Cleveland and the Village of East Cleveland under these ordinances and resolutions passed prior to 1878, those relations are now controlled by new contracts made afterwards and substituted in lieu of the former contracts. As already stated, before June 12, 1879, there was no specific statutory provision relating to the renewal of existing grants; and on that date an act was passed by which the municipalities were authorized to

> "renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

This power to renew confers the right to make a new contract between the City and the Railway Company in the place of its pre-existing contracts. The mere exercise of the right carries with it the idea of substituting the renewal contract in all respects in the place of the former contract.

On September 8, 1879, The East Cleveland Railroad Company filed with the Council of the City of Cleveland its petition for a renewal of its "grant and license" in which it represents "that said original grant was for the period of twenty years as then fixed by law and by the provisions of a general ordinance passed September 20, 1859;" and prays: "That such grant of renewal and license may be made to said Company for the term of twenty-five years from and after September 20, 1879." (Record, pages 203 and 204.) A renewal grant, complete in itself, and dealing comprehensively with every phase of the subject of the right to maintain and operate a street railway, was then passed by the Council and accepted by the Company. (Record, page 204.) This renewal ordinance, however, covered only that part of the Euclid avenue line between Water street and Willson avenue. But later, on April 4, 1883, another ordinance was passed

authorizing the Company to lay and construct a double track east of Willson avenue. Previous to that time, there had been constructed only a single track over this part of the line. This ordinance conferred as to the line east of Willson avenue the right to continue its operation until the same date as that fixed for the territory west of Willson avenue, namely, until the 20th day of September, 1904. (Record, page 209.)

On July 13, 1888, another ordinance was passed authorizing the Company to equip with electric motive power its street railway on Euclid avenue east of Willson, and on Cedar avenue east of the Cleveland and Pittsburg crossing. And it was provided (Record, page 219) by Section 8, that when the Council should so require, the same motive power should be extended over the entire length of the main line and the Cedar avenue.

By resolution passed May 13, 1889, this extension of the motive power was required, and the Cedar avenue line throughout its entire length, and the main line from Willson avenue west, following Euclid avenue to Case, Case to Prospect, Prospect to Erie, Erie to Euclid avenue, Euclid avenue to the Public Square; thence around the south side of the Public Square, and through Superior street to Water street, were equipped by electricity.

It was provided by Section "6" as follows:

> "The privilege of constructing the electric system and the operation of its lines as hereinbefore provided is granted in consideration of the improved facilities hereby contemplated, and the large expenditure necessary to secure the same and shall be in force for a period of twenty-five years from and after the date of the passage of this ordinance upon its main and Cedar avenue lines."

It was further provided that,

> "If from any cause said Company shall fail to extend the said electrical system over their entire main and Cedar avenue lines within eighteen months

from the date of the passage of this ordinance, then said ordinance shall be null and void so far as it relates to extension of charter."

The grant for the Garden street line was renewed by the ordinance passed March 22, 1880. (Record, page 208.) This ordinance was accepted and the additional privileges and rights thereby conferred were enjoyed by the Company. The power of the Council to make this renewal eight years in advance of the expiration of the existing grant was litigated. It was contended that the statute conferring authority to make a renewal provided that such renewal should be made at the expiration of the existing grant, and that this forbade the making of such renewal grant in advance of the substantial expiration of the grant.

This litigation is reported in the case of *State ex rel. vs. The East Cleveland Railroad Company*, 6 C. C. 318, affirmed by the Supreme Court without report.

The view then announced by the Court was that it was competent upon a valuable consideration inuring to the public for the Council in advance of the expiration of a grant to accept a surrender thereof by the Grantee, and to make a renewal grant upon new and different terms; that the transaction in this case was the equivalent of a surrender by The East Cleveland Railroad Company of its grant for the Garden street line, and the acceptance of a renewal grant in lieu thereof; that the extension of track was a sufficient consideration for the surrender of the old grant and the making of a new one. If this be true, as against the public, it must be equally true as against the Street Railway Company.

It is clear, it seems to us, that a new contract for a valuable consideration has been made by the renewal grant of March 22, 1880, and that it is in complete substitution for all pre-existing grants. The renewal grant deals expressly with the same subject matter and contains a new and explicit provision with respect to the duration of the term. It

was competent for the street railway company for the added privileges and upon the new considerations to contract away any or all indeterminate rights it may have previously owned, and to accept in lieu thereof one for a fixed period. In view of the opinion of the Court in the case last cited, it cannot be denied that the extension of tracks was an adequate consideration to justify the surrender of previous rights.

In this respect the case is controlled by *Cleveland vs. The Cleveland Electric Railway Company,* 194 U. S., 538, in which it was held that the right to regulate fares reserved in the renewal franchise of 1879 was annulled by the ordinances of 1886, 1887, 1888 and 1889, in which in authorizing the extension of tracks and the equipment of the line by electricity, it was stipulated that the Company should charge and collect for passage over its lines in either direction but one fare and not more than five cents without any reservation of a future right to alter rates of fare, and with a stipulation that the rights conferred should continue during the life of the franchise.

V

THE CREATION OF A UNIFIED SYSTEM, ALL OF WHICH EXPIRES AT THE SAME TIME.

The position of plaintiff below is that all of the street railway lines in the city having been brought under one management and ownership with certain transfer rights over the lines as merged or consolidated, an entire system is thereby created and that the right to operate all or any part of it must and does expire at the same time.

The Cleveland Electric Railway Company was, from July 1st, 1903, and until the establishment of the lines of The Forest City Railway Company, the owner of ail the street railway lines in the city of Cleveland. From May, 1893, until the 1st of July, 1893, there were two street railway com-

panies owning and operating lines in the city of Cleveland, namely, the plaintiff and The Cleveland City Railway Company.

On the 1st of July, 1903, The Cleveland Electric Railway Company acquired, by purchase, as permitted by statute, all of the lines previously owned and operated by The Cleveland City Railway Company.

At the time of this purchase The Cleveland City Railway Company was the owner of the franchises originally granted to The Woodland Avenue Street Railway Company and The West Side Street Railway Company, which had, in February, 1885, been consolidated into one company.

The franchises of The Woodland Avenue and The West Side Street Railway Company were under review in this Court in the case of *The City of Cleveland vs. The Cleveland Electric Railway Company*, 201 U. S., 529, and were limited to expire upon the 10th of February, 1908. Originally the franchise owned previous to this consolidation by The Woodland Avenue Street Railroad Company, had been granted to expire the 22nd of September, 1904, but, in consequence of ordinances passed after the consolidation of the company, it was held in the case mentioned, that this franchise was intended to expire not earlier than February 10th, 1908, and at the same time that the franchises of The West Side Street Railway Company expired.

The Cleveland City Railway Company also owned and operated lines on St. Clair street, Superior street and Payne avenue, all of which were limited to expire on different dates in January, 1910. These had formerly been owned by The Cleveland City Cable Railway Company, and became the property of The Cleveland City Railway Company in consequence of the consolidation of The Cleveland City Cable Railway Company with The Woodland Avenue and West Side Street Railway Company. This consolidation took place in the early part of 1893.

Previous to the creation of The Cleveland Electric Railway Company, the franchises which it acquired thereby, had been owned by four separate companies: The East Cleveland Railroad Company, The South Side Street Railroad Company, The Brooklyn Street Railroad Company and The Broadway & Newburgh Street Railroad Company.

On March 25th, 1893, The East Cleveland Railroad Company and The Broadway & Newburgh Street Railroad Company were consolidated, creating The Cleveland Electric Railway Company.

On the 24th of April, 1893, The Brooklyn Street Railway Company and The South Side Street Railroad Company were consolidated with The Cleveland Electric Railway Company (Record, page 230).

The franchises owned by The Brooklyn Street Railroad Company, but for the consolidation, would expire on the 26th day of January, 1910; those of The South Side Street Railroad Company, in July, 1913; those of The Broadway & Newburgh Street Railroad Company, July 1st, 1914; those of The East Cleveland Railroad Company expire, as we contend, at different times. The Euclid Avenue or main line franchise, with its two extensions—the Cedar avenue and the Wade Park lines, expire July 13th, 1913, and its franchise for its Garden street line, March 22nd, 1905.

It is contended, we understand, that the effect of the consolidation and of the purchase above referred to, with such transfer privileges and rights for a continuous ride as are exacted by statute and provided for in the resolution of May 22nd, 1893 (Record, page 230), create an entire system of street railway franchises all expiring at one time.

It is further contended that after the consolidation, an intention has been manifested by the subsequent ordinances and resolutions of the Council, to recognize the date of the last expiring franchise, namely, July 1st, 1914, as the date

at which these franchises shall expire.

It is further contended that even if no such intention can be inferred from any action of the Council, nevertheless the obligations imposed to carry passengers for one fare over the entire system and to give certain transfer rights, creates a corresponding right to operate every part of the system until the date of the last expiring franchise.

It is manifest that if any of the franchises originally granted for a specific and definite period has been prolonged, the prolongation is not due to any *express* grant of the Council or of the legislature, but must be founded upon implication more or less violent.

Section 4 of the Act passed April 10th, 1861 (58 O. L., page 66), provided that "Whenever the lines of road of any street railway companies meet or intersect, and have been or may be constructed so as to admit the passage of cars over such roads continuously without break or interruption, they are hereby authorized to consolidate themselves into a single corporation in the same manner provided for the consolidation of railroad companies." This section, in one form or another, still remains in force, now being Section 2505-b (3443 — 16).

By the Act passed May 7, 1869 (66 O. L., page 140), providing for the extension of tracks, it is provided:

> "And when any such extension shall be made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads by consolidation under existing laws, shall not be increased by reason of such extension or consolidation."

This section is still in force, now being, as amended, Section 2505 (1536 — 188).

The effect of these provisions in reference to consolidation, is the same as certain sections providing for the consolidation of steam railroads. Following the statutory

procedure, all the property of the constituent companies is transferred to the consolidated company and becomes subject to all of the restrictions and obligations of each of the constituent companies. Notwithstanding these provisions for consolidation and the frequent exercise of the right to consolidate, it has never before been intimated that, in consequence thereof, the franchise grants of the constituent companies were, in any way, amended or enlarged by reason thereof. It has been the practice in the past to apply for, and obtain, renewals to the company created by the consolidation, just as if the franchise remained in the hands of the constituent company to which it was originally granted.

The provisions for lease or purchase was inserted in the Statute at a later day, but prior to the consolidation of 1893 and also to the purchase of 1903. It is a plain provision for the purchase by one company, of all the property and franchises of another company. It further provides that

> "The fare charged for one continuous route or ride in the same general direction over all such lines or purchased lines within any municipal corporation, shall not exceed the maximum fare charged over any one of said lines prior to such lease or purchase."

None of these Statutes require the assent of the Council of the municipality to the consolidation or to the purchase of the road. The companies may consolidate, even against the objection or dissent of the municipality. Section 3443, it is true, provides that the Council shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated, but the right to consolidate exists and may be exercised independently of this power in the Council.

The plain effect of these provisions is simply to transfer the franchise owned by the constituent company, to the

consolidated company. A franchise contract is property just as real estate or power-houses. It may be likened to a leasehold interest or easement in the streets, created by agreement with the municipality which owns the street. By the effect of the consolidation or the act of purchase, that property interest is transferred without other conveyance, to a consolidated company. Manifestly, the consolidated company takes the property, that is, the franchise, subject to all its terms and conditions, just as it was originally created by agreement with the municipality.

This was the obvious object and purpose of these Statutes. Their language is designed to accomplish this purpose and none other. Any other effect, such as enlarging the period of duration of the franchises, or any of them, must follow from implication.

The consolidation and purchase are effected by the Legislature. The effect of the consolidation is to confer corporate existence on the consolidated company. In this respect, after the consolidation, the new company, as to its rights to corporate existence, stands on the same footing as if the charter had been under the general law. This, however, is a separate right from the franchise obtained from the city to maintain and operate a street railway in the streets of the city. To assert that it has some other effect, is to lose sight of the distinction between those franchises conferred by the State and obtained by organization under the State law, and those contractural franchises not granted by the State and not inherent in the corporation as such, but which come from the local authority having control of the public highways.

The question presented is substantially the same as that involved in the case of the *Louisville Trust Company vs. The City of Cincinnati,* 76 Fed. Rep., 296.

The Cincinnati Inclined-Plane Railway Company had been organized under the Steam Railroad Act of 1852. By

an amendment made in 1877, Inclined-Plane Railway Companies were authorized to hold, lease or purchase street railway companies. The exact language of the Act is:

> "Shall have power to hold, lease or purchase, and maintain and operate, such portion of any street railway leading to or connecting with the inclined-plane, as may be necessary for the convenient despatch of its business, upon the same terms and conditions upon which it holds, maintains and operates its inclined-plane."

Under this power, the Inclined-Plane Railway Company acquired several street railways connecting with its Inclined-Plane Railway, including the franchises owned by them.

It was contended that the effect of this Act, authorizing the purchase and operation of such street railway in connection with the Inclined-Plane, was to extend the franchise right acquired from the street railway company so as to make it continue during the life of the franchise right of the Inclined-Plane Railway Company.

In discussing this question, Judge Lurton said:

> "We do not mean to intimate that the municipal or local authority is the only source from which such an easement could come in Ohio. The legislative history of the State is such, however, as to indicate that the settled public policy of the State is not to confer said easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the State for the requisite street easements, upon terms and conditions to be agreed upon between such companies and the local government. When, therefore, we come to construe an Ohio Statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this well-settled policy has not been departed from, and that the State has stopped with the grant of the usual and

necessary corporate franchises proper, by which it had been endowed with power to operate its road for tolls, when it shall have acquired from the local authorities the equally essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business."

And further:

"The intention of this law was simply to vest Inclined-Plane Railway Companies with the corporate power to acquire and operate street railroad routes, leading to, or connected with, the Inclined-Plane; that, in the acquirement of such roads, such companies stood in the same position as other persons and other street railroad companies, and that when such routes are acquired by such companies, they are bound by all the provisions of the original grant by the city, and that none of the provisions of the same are abrogated by such acquirement."

And further:

"The legislature was not dealing at all with the subject of the term of duration of the street rights of such company, but was dealing with the question of the corporate capacity of a corporation organized under the Steam or Commercial Railway Act to maintain or operate an ordinary street railway."

The conclusion announced by Judge Lurton, was as follows:

"It follows that this company held the right to maintain and operate its Inclined-Plane Railroad just so long as it had the right to occupy the place upon which its tracks were located. As to a part of its railroad, its right to occupancy was unlimited, because it owned the fee in the property upon which its tracks were fixed. As to so much of its railroad as occupied Locust street, or any of the streets, over which its tracks had been constructed, its right to maintain or operate its railroad over or upon public streets depended upon the duration of its grant from the city."

The situation in that case and the one under consideration is quite analagous. The street railway which the Inclined-Plane Railway Company was authorized to acquire, was such as connected with its inclined-plane and as might be necessary for the convenient despatch of its business. It was authorized to hold the same upon the same terms on which it holds, maintains, and operates its inclined-plane. It was just as necessary and convenient to the company that all of its rights should expire at the same time, as it is in this case; but the Court, in an opinion most carefully considered, limited the meaning of the Statute to its obvious purpose, and did not hesitate to adopt as its conclusion, that the franchises acquired from the street railway companies were not abrogated or enlarged, and that they expired at different times. We submit, in principle, the case is controlling.

There may, or may not be, many advantages in the development of a system, all the parts of which shall expire at one time. That is a question of policy upon which this Court is not called to pass an opinion. There may, on the other hand, be just as many advantages in having the different routes or lines expire at different times. The problem of making new contracts for the operation of street railways may be less difficult if the Council has to do with a single line of a few miles at a time than if it is obliged to make new contracts and provide new street railway service on other terms over a large system; but, whatever may be the wisdom or unwisdom of one policy or the other, the Legislature has manifested no intent to deprive municipalities of their control over the streets, or to take from them the duty of agreeing on terms and conditions for the use of those streets for street railway purposes.

A contract made between the city and the street railway company for the use of the streets is as much entitled to protection against enlargement to the detriment of the city, as it is against impairment to the detriment of the street

railway company.

As was said by the learned Judge who delivered the opinion of the Court below,

> "Two observations conclusively answer the contention of the plaintiff; *first*, that if there is any control over the life of the system and of its parts, it is the life of the system which must control the life of the parts, not the part of the system. *Second*, it is far from the truth that physically or practically or legally, the one part of the system is essential to the operation and life of the system."

An inspection of the map (Record, page 258) will disclose the force of this observation. It is not conceivable that every one of the lines is essential to the operation of the system. It does not follow that the loss of any one line will destroy the system. It is not apparent that when companies holding different lines, were consolidated, an intention was evident either to the Legislature or to the Council, that all of the franchises previously granted, must be prolonged or abbreviated to some one date, at which all must thereafter expire.

Appreciating the force of these observations, the position is taken that the date of the last expiring franchise is the one that must be selected. But why the date of the last expiring franchise rather than of he first expiring franchise? It may be that the franchise, first expiring, is for nine-tenths or ninety-nine hundredths of the entire trackage, and the argument would require this large proportion to be controlled by the insignificant minority. Why, if the system must be unified at one date, should not the duration be averaged in some way? This would be fairer to the city which has, at least, equal rights with the street railway companies. More important than all, why should any change follow in the dates of expiration of the franchises? Manifestly, the consolidation, or the purchase under and by virtue of the Statutes, can have no effect upon the contractual rights or easements cre-

ated, not by the Legislature, but conferred by the city.

Nor is any purpose evident from any of the ordinances passed by the Council to treat the street railway as a system, and to fix a uniform date of expiration. As already stated, the street railway company made the consolidation of its own initiative. In its communication to the Council, of May 22nd, 1893 (Record, page 230), it says:

> "These consolidations were made under the advice of counsel and believed to be legal and valid in all respects."

It is further said, that since some doubt has arisen as to the intention of the company, the company desires to state officially that it does not claim any rights greater than were owned by the constituent companies that formed the organization; that it has, since the consolidation, issued transfer checks to all persons desiring them, to enable such persons to have a continuous ride from any of the East Side lines to any South or West Side line, and for one fare, and will continue such system of transfers where it cannot better accommodate its patrons by such other lines as it may establish; that it disclaims all intention of charging more than one fare for any such continuous ride.

Here is an express disclaimer of any belief on the part of the company that it acquired any greater rights than were owned by the constituent companies. Its statement to the Council is not a request for any additional rights, but a proclamation of its intention and an explanation of the legal effect of its acts.

It is a disclaimer of an intention to charge more than one fare for a continuous ride over the lines as consolidated, and its announcement that it was giving transfer checks, and would continue to do so, except where it could better accommodate its patrons by a through line, is a statement only of the legal duty imposed by the Statute in all cases where a consolidation is effected.

The Act of 1867, already quoted, attaches such a consequence to any extension of tracks or to any consolidation of street railroad companies.

Having concealed from the Council any other intention, having interpreted its own acts in this explicit way, it cannot be said that the resolution of the Council passed immediately thereafter and in consequence of this communication, can confer any additional rights. To sanction such a construction would be a fraud on the representatives of the people. In effect, it is only an assent to consolidation on the terms prescribed by Statute, and not the fixing of new terms and conditions, whereby the consolidated company is to be governed. The transfer check is not the creation of a new right, but merely a device to enable the company to discharge its statutory duty. As a consequence of the consolidation, it is required to carry passengers for one fare for a continuous ride in the same general direction, and the inconvenience of operating through lines of cars made necessary this device. It did not create a right, but was an incident in the performance of a duty.

Much has been said about the added benefits conferred upon the public by giving this continuous ride and issuing these transfers. It must be remembered that the burden is one voluntarily assumed by the company; it is made a condition of any consolidation. If the burden thus imposed was greater than the other benefits the company expected to obtain, it manifestly would not have consolidated.

Nothing, therefore, can be implied from this fact, to change the rule of construction which is always applied to acts of the Legislature or of municipalities conferring franchise rights. These rights, although conferred upon public grounds, are, nevertheless, of great value to those seeking them, and are sought with avidity. Every consideration that requires an original grant in derogation of public rights, should be strictly construed, that forbids anything to pass by im-

plication, that requires plain and explicit English words to create the right asserted, applies with full force to every Statute or ordinance authorizing or assenting to a consolidation of street railway lines or the extension of the tracks of existing lines.

The Council of the City of Cleveland, since the consolidation of 1893, has not manifested, by ordinance, any intent to fix a uniform date of expiration. It has not selected July 1st, 1914, the latest date of expiration for any franchise then existing as the date upon which shall expire all franchise rights subsequently granted. The intent of the Council, so far as it has been manifested, is to preserve the separate dates of expiration for the separate lines.

On August 5th, 1901, the Council passed an ordinance granting the right to The Cleveland Electric Railway Company to extend and operate a single track in the Public Square, which was limited to expire March 22nd, 1905, the date fixed for the expiration of the franchise of the Garden Street line.

On June 23rd, 1902, it passed another ordinance authorizing The Cleveland Electric Railway Company to extend and operate a double track in certain parts of Erie street, which is also limited to expire on the 22nd of March, 1905 (Record, page 243). About the same dates six other similar ordinances were passed granting to The Cleveland Electric Railway Company or to The Cleveland City Railway Company the right to extend their respective tracks, which are also limited to expire on the 22nd of March, 1905 (See Supplemental Record).

The several ordinances to which we shall refer more particularly in that part of our argument treating of the date fixed for the expiration of the Garden Street line, which were passed after March 22nd, 1890, manifest no intent on the part of the Council to make the same expire on July 1, 1914, or on any date other than March 22nd, 1905, the date fixed

for the expiration of the Garden Street line.

In considering the effect of the consolidation, it is necessary to view the ordinances from the position of the Council, at the time they were severally passed. The intent to create a unified system, it cannot be said, was then evident to the Council. The thought that any such intent ever existed arises from a process of reasoning backward after the ownership of the lines has been brought within the control of a single company.

It is founded upon inference, implication, and speculation, incomprehensible to the lay mind, and scarcely to be discovered by a lawyer without his attention being especially directed to it. We submit that there is no foundation for the assertion that a unified system has been created with a uniform date of expiration for all its franchises and that such date is that of the longest continuing franchise.

VI

THE WILLSON AVENUE EXTENSION OF FEBRUARY 19TH, 1894.

It is asserted that this ordinance, by requiring the companies to whom was granted the privileges thereby conferred, to transfer passengers to and from Willson avenue on all intersecting lines without an additional charge, and to transfer from the second line to a car which crosses the Cuyahoga River, imposed an obligation upon the companies, which can only be performed according to its obvious purpose, by permitting the companies to continue to operate all intersecting lines until July 1st, 1914, the date of expiration fixed in the Willson Avenue ordinance.

The title of this ordinance is one granting permission to The Cleveland Electric Railway Company and The Cleveland City Railway Company to extend their tracks in Willson avenue. Obviously, therefore, the object to be ac-

complished by the ordinance was simply to permit the extension of tracks as provided by Statute. At that time The Cleveland Electric Railway Company had tracks in Willson avenue between Scovill avenue and Broadway. (See Map; Record, page 230.) The franchise for these tracks expired January 22nd, 1910. (See Supplemental Record.) It also had tracks in Willson avenue, between Hough and Perkins, which were a part of the Wade Park extension of The East Cleveland Railroad Company, and expired July 13, 1913 (Record, page 269). The Cleveland City Railway Company had tracks in Willson avenue, between Payne and Lexington, the franchise for which expired in 1910. The two companies were authorized jointly to construct extensions in Willson avenue necessary to close these gaps, and continuing the construction northwardly to the terminus of the street.

Except for Section 6 containing the transfer privileges already referred to, it could not be contended that these ordinances had any effect different from that of any other ordinance authorizing an extension of tracks.

The language of Section 1 shows that the new tracks were to connect with the existing track on Willson avenue, and were to be operated in connection with the existing tracks in Willson avenue. Nothing is said with reference to their being operated in connection with a system of street railways or with any other track than those already in Willson avenue.

No language is used from which it can be inferred that the Council were intending to affect the provisions of the franchises outside of Willson avenue. Neither directly nor indirectly can it be said that it was intended to renew the grants for lines on other streets, or to prolong the franchises for those lines; any argument to the contrary is the merest inference and conjecture.

The companies applying for and accepting this right

to extend tracks, did so subject to the provisions of Section 2505. This provision gives the passenger the right, upon the payment of one fare to be carried not only over the extension, but over the rest of the line, of which the extensions become a part. This is true, aside from the provisions of Section 6.

The relation, however, geographically, of the tracks on Willson avenue to the tracks of which they are an extension, is such as to make it impossible, from an operating point of view, to perform this statutory duty without requiring passengers to change cars. If passengers are to change cars in order to have the continuous ride which the Statute imposes as a condition of the extension, then some system must be adopted for an identification of the passengers leaving one car and applying for passage on another. The device adopted was that of issuing what is called a transfer check. If not simpler, it is surely more economical than having stations and gatemen to superintend the changing of passengers from one car to another.

The provisions, therefore, of Section 6, with reference to franchises, is merely an economical device of the street railway company to enable it to discharge its statutory duty. It could not obtain the right to extend its tracks in Willson avenue on any other terms. The fact that the tracks were constructed as an extension, gives the right to a continuous ride. If the company wished to escape this duty, it could have done so only by competing as to the rate of fare, with other persons or companies for the right to construct and operate a street railway on Willson avenue. To escape this salutary public safeguard and to acquire the right to construct its tracks without competition, it was necessary to assume the duty of giving passengers a continuous ride, and this, as we have seen, could not be done without some system of identifying passengers transferred from one car to another.

The language of Section 6 admits of no other construction. It does not follow that the Council had in mind the exaction of the transfer privilege to any other line of either company, except so long as such company had that other line. It does not follow that the right to be transferred from such second line to a car on any other line of the company operating the same, which crosses the Cuyahoga River, after such company ceased to have any other line, was in their mind. It is only from any line of either of said companies, intersecting or going to Willson avenue, that the companies operating cars on Willson avenue are obliged to receive passengers without an additional fare.

It is manifest that this provision for the exchange of transfers is fully performed according to the intent of the Council, by giving and receiving transfers so long only as either of such companies have other lines in a position to perform the duty.

It will be borne in mind that the extension of tracks on Willson avenue is not an extension of the tracks of the Garden Street or the Central Avenue line. The tracks on Willson avenue merely cross the tracks on Garden street. It is true the duty of transferring the passengers applied to the Garden Street line because it intersected Willson avenue; but it, by no means, follows that the Council intended an effect not apparent on the face of the ordinance and difficult to be understood even by a lawyer.

Counsel invoke in favor of their contention the rule applied between private persons, which holds that whatever is reasonably necessary to the enjoyment of the thing granted shall pass by implication. If the streets of Cleveland were the property of a private owner, no such consequences, we submit, as are contended for, would follow. It is foreign to all the purposes of the ordinance itself. It is not reasonably necessary to the enjoyment of the right to operate the tracks on Willson avenue. But this rule has no application to

grants made by sovereign powers dealing with the rights of the people. Implications from what is necessary or convenient cannot arise. It is only what is given in express, unambiguous language, or which flows from an implication as clear and cogent as if set down in apt words, that passes to the grantee.

The distance covered by this extension of tracks on Willson avenue does not appear from the record. The comparative distance in relation to all the lines then owned, will appear from examining the two maps at pages 230 and 258 of the Record. About one-half the distance on Willson avenue is p[illegible] for in this ordinance, and this is, perhaps, one-fifti[illegible] of the entire trackage.

Now it is asserted that the Council, by the use of indefinite language, not evidencing a clear intention, dealing with the triviality of a short extension of track, has renewed to the same date the franchises for all the rest of the system, perhaps fifty or a hundred times as great in length.

If this be true, then, as was said by the learned Judge who delivered the opinion of the Court below, the Council may give away the property of the people in their streets without knowing it and while striving not to do so.

In this connection, notice may be taken of an argument much relied upon which applies not only to this position, but to all the positions of the plaintiff. It is said that an extension of tracks under the provisions of the statute must be operated in connection with and as a part of the line as extended; in other words, the extension of tracks and the original line thus extended become merged in one; that they can be operated in no other way than together as an entirety; and, that, therefore, by necessary implication whether the ordinance says the extension of tracks is to be operated in connection with the existing line or not, it must, of necessity, be so operated, and that when a new date is fixed for

the expiration of the track extension, this prolongs the date of expiration of the original line.

This argument ignores the distinction pointed out by Judge Lurton in *Louisville Trust Company vs. Cincinnati*, 76 Fed. Rep., 296. The Legislature in Ohio has never attempted to confer franchises to use the streets. It infringes on the settled law and policy of Ohio, which is to refer all persons desiring such franchises to the municipal authorities and which empowers the latter to fix the terms and conditions for such use. The Legislature has empowered the municipalities, it is true, to authorize street railway companies to extend their existing tracks, thus rendering unnecessary compliance with other restrictions enacted to safeguard the public interest, such as public advertisement and competition as to the rate of fare; but as a condition of such track extension the right to ride for one fare over the track as extended is imposed. It cannot be inferred from this last requirement that the Legislature intended to restrict the powers of municipalities in making contracts for the use of its streets, or that it intended to overthrow any rules by which the acts of the municipalities must be construed.

The fact that the municipality in authorizing the extension may say it is to be operated in connection with the existing tracks to which the extension is annexed adds nothing to the force of the statute. To say in addition that the right to operate the extension shall continue to a date beyond that of the original line without using plain, express language to evidence an intention to prolong the life of the original line, cannot, in view of those rules, operate to prolong the right to operate the original line. The doctrine of strict construction, when a grant in derogation of the public right is to be construed, forbids such an inference. The language of the track extension ordinance will be construed as if it said, nothing herein contained shall affect or enlarge any other contracts between the City and the Railroad Company.

The logic of the argument requires that a track extension under these circumstances for a few hundred feet with a provision that the right thus conferred shall continue to a date beyond the franchises for the existing lines shall operate as prolonging the life of two hundred and thirty-six miles of street railway. This contention is made with respect to the Willson avenue ordinance for trackage from fifty to one hundred times as great as the extension authorized on Willson avenue.

This latent concealed purpose and effect is not disclosed on the face of the Willson avenue extension ordinance or of any other ordinance authorizing extensions of track or the construction of an additional track. It is found concealed in the mazes of ordinances of relatively small consequence, and is enforced by a process of reasoning which the lay mind has difficulty in comprehending, and which it could hardly discern at all unless pointed out. Commenting on this argument, the learned Judge of the Court below in denying it force used language which cannot be improved upon. He says (Record, pages, 79, 80):

> "And this is true, not only for the reasons already asserted, but because of the nature of the situation which exists when such legislation is under consideration. The municipal legislative body does not always consider the possible legal deductions which may be made from its language, and it could not do so; when the matter is susceptible of such easy expression in the English language, it might well be supposed that if, by an ordinance, it was intended to fix a period for a franchise, it could be done in unmistakable terms. There is no need of concealment in such cases, and no need for implication.
>
> "If it be true that to grant the right to build an extension and permit its operation as such in connection with the system of which it forms a part, for a period beyond the duration of the sys-

tem's franchise, is to extend to that date the franchise of the system, then we must conclude that the Council may give away the public's property and the rights of the community, without knowing that it is doing so, and while striving not to do so. It is most ingeniously and plausibly argued that, to give the right to operate, in connection with the main stem, the extension of an existing line, to a time beyond the time allotted to the existing main stem, is, by implication, to extend the period of right to operate the main stem, because, if it were otherwise, it would lead to an absurdity, and leave the fragmental extension alone and incapable of operation when the franchise of the main stem expired.

"Yet, apart from the fundamental objection which I shall hereafter discuss, a little reflection suggests many answers to the claim. The extension may or may not be incapable of independent operation. Is the determination of the right to depend upon the particular conditions of independence, or of isolation, in each case? The price is too high, and the implication too severe and far-reaching, if, as claimed by counsel, a slight prolongation of a line, made under the statute allowing extensions, shall suffice to extend the franchise of two hundred and thirty-six miles of line if, perchance, a careless, or generous, or complacent Council, dealing with the triviality of a few hundred feet of extension, should give the right to operate it, in connection with the main line, for a period beyond the date of expiration of the main line's franchise. Certainly, no obligation is incurred to so operate in connection with the main line after the company's franchise to the main line has expired.

"No doubt the vigilant representatives of the railway company will always endeavor to procure the longest possible term for the most trivial extension. The Council may think the right of such slight importance as to grant it without thought

> of any additional and important rights arising by implication. When the right is possessed, if it can be possessed, and the corporation is in possession even of only a few hundred yards under such a franchise, it has a position of some importance, and sometimes of controlling importance."

To sanction the argument does violence to the rules of construction announced in *Blair v. Chicago*. The words from which this result is inferred, are equivocal and ambiguous. They do not grant in express terms all that is claimed for them. They do not make a grant of the right claimed in plain terms. They conceal by a skillful use of words the purpose which it is now said was intended to be accomplished. They do not set down in plain, unmistakable English words, the intention which it is now asserted was embodied therein. It is manifest that had what is now claimed for this track extension ordinance been set down in plain words and asked for directly from the Council, it could not have been had. And to permit such privileges to be cloaked and covered up under ambiguous and equivocal expressions not distinctly presenting the subject of their extent and propriety to the councilmanic mind, exposes the Council to deception and enables the parties by this artful duplicity of language to claim and enjoy privilges which the Council most assuredly would not have conferred had they been directly and clearly asked. (*New Orleans, etc., Railway v. New Orleans*, 34 La. Ann., 477.) Instead of permitting only those rights to pass which are conferred in express language, the construction asked for passes rights which were denied in express language.

We submit that nothing can be claimed by virtue of the Willson Avenue extension ordinance or any other track extension ordinance as a prolongation of the life of other lines.

VII.

THE TRUE EXPIRATION DATE OF THE GARDEN STREET OR CENTRAL AVENUE LINE.

The contention is that the Garden Street or Central Avenue line is an extension of the Euclid Avenue or main line of The East Cleveland Railroad Company; that it was and is operated as an extension in connection with the said main line, and by force of the statute as well as the obvious intent of the Council, expires at the same date as the line from which it is extended. Also that the ordinances of the City of Cleveland authorizing The East Cleveland Railroad Company to lay certain track extensions and additional tracks manifest an unambiguous and express intent to make the Garden Street line a part of the Euclid Avenue or main line, and its franchise to expire at the same date, which, as we have seen is July 13, 1913.

Our contention is that the Garden Street line was established and the street railway thereon constructed as an original street railway route, and not as an extension of existing tracks; that it was so created with all the formalities such as public advertisement and competition as to the rate of fare of an original grant or route; that its separate identity and independence has ever since been recognized and preserved by the City of Cleveland in dealing with it, especially in renewing it and authorizing it to be equipped with electricity; and that no intent is manifested in the ordinances authorizing track extensions or the laying of additional track, to destroy the separate identity of the line, to convert it from an independent street railway route into an extension only and a part of the Euclid Avenue or main line of The East Cleveland Railroad Company, or to prolong the date of expiration from the 22nd day of March, 1905, the date explicitly agreed on in the renewal ordinance, to the 13th day of July, 1913, the date fixed for the expiration of the Euclid

Avenue or main line of The East Cleveland Railroad Company.

As was said by the learned Judge of the court below:

> "An examination and comparison of the several ordinances relating to this subject leaves upon the mind the indelible conclusion that after the ordinance of March 22, 1880, all of the extensions of the Garden Street line were intended to expire with the Garden Street main line franchise, viz., March 22, 1905";

that it was

> "the purpose of the Council all the time to make the life of the right to operate the Garden Street line all the same throughout its length and over all the extensions and additional tracks."

An examination of the ordinances and of the statute law dispel any doubt as to the original character of the Garden Street line. It was created by the Council, granted to The East Cleveland Railroad Company, and constructed and equipped by that Company, as an original, separate and independent line, and not as an extension of the Euclid Avenue or main line.

The ordinance making this grant was passed January 14, 1868 (Record, page 188). The grants previously made to The East Cleveland Railroad Company had conferred on it the right to construct and operate a street railway commencing on Superior Street at Water Street; thence through Superior Street to the Public or Monumental Square; thence through the Square and Superior Street to Erie Street; thence through Erie Street to Prospect Street; thence through Prospect Street to Case Avenue; thence through Case Avenue to Euclid Avenue; thence through Euclid Avenue to Willson Avenue, the limits of the city; and by permission from the Trustees of the East Cleveland Township beyond Willson Avenue on Euclid Road or Avenue to Doan's Corners, afterwards Fairmount Street. Subsequently this route was changed

so as to pass from Erie Street to the Public Square by way of Euclid Avenue. The ordinances of the City of Cleveland had fixed a period for the duration of these grants as twenty years from the 20th day of September, 1859.

The ordinances created a single street railway line, frequently thereafter referred to as the main line of The East Cleveland Railroad Company, expiring at a date certain. The streets covered by this line were also expressed with obsolute clearness.

In this situation on January 14, 1868, the grant was made to The East Cleveland Railroad Company for permission to construct a street railway

> "from the intersection of Prospect and Brownell streets to connect with the main line of its railroad; thence along the center of said Brownell street to its intersection with Garden street; thence easterly along the center of Garden street to and across Willson avenue to the easterly boundary of said city."

The resolution adopted by the Council recites an application previously made for leave to construct a street railroad over these streets; that the Company had filed the consent in writing of a majority of the property owners abutting on said streets; that said Company had filed with the Council a bond in the penal sum of $20,000.00 to construct said railroad within twelve months from the date of the grant, and leave given by the Council; that the requisite notice for bids had been given as contemplated by the statute, and that the bid filed in pursuance thereof is the lowest rates of fare for carrying passengers made by any company or individual. In consequence, following these recitals, the consent of the Council is given to The East Cleveland Railroad Company to construct its street railway upon said streets and avenues, and to use and occupy the same with its track, switches and turn-outs for and during a period of twenty years from the date of the making of the grant, subject to the provisions of an ordinance of the City passed on De-

cember 4, 1866. It is further provided that The East Cleveland Railroad Company might continue to use and occupy the streets over which its main line was operated westerly from the junction of said road with the main line to its westerly terminus.

The acceptance shows the interpretation put on this grant at the time it was made. The Company, by virtue of a resolution of their stockholders

> "hereby accept the grants and permits to construct and operate a railroad from their main track in Prospect street, through Brownell to Garden, and through Garden to the easterly line of the city."

There was no law then or at any time in Ohio which forbids an individual, company or corporation owning and operating a street railroad from becoming a bidder on any other street railway route on which the municipality may be inviting proposals to construct and operate a street railroad. Such company may bid for as many street railway routes as the Council sees fit to create, and if it agrees in its bid to carry passengers at a rate of fare lower than any other bidder, then the municipality is obliged, if it makes any grant, to make it to that bidder. Nothing in the law places the grant thus obtained on any different footing, or requires the application of any different rules of construction than would apply if the route thus acquired was the first or only one acquired by the bidder.

The Council in providing street railway transportation on Brownell and Garden streets, saw fit to adopt this method. In fact, at that time no statute was in existence authorizing the Council to grant leave and permission to extend the tracks of existing routes. In any event in order to make sure that the people had secured the person that would agree to carry passengers for the lowest rate of fare, the municipality in this instance established Brownell and Garden streets as a street railway route, invited proposals to carry passengers thereon at the

lowest rates of fare, accepted the proposal of the lowest bidder, and made the grant. Possibly the geographical relation of Brownell and Garden Streets to the line already owned and operated by The East Cleveland Railroad Company and to the rest of the city placed other bidders at a disadvantage; but be that as it may, The East Cleveland Railroad Company was the lowest bidder for this route, and obtained the grant. Notwitstanding the subsequent change of the law which permits tracks to be extended in any direction or for any distance, the municipality may, and no doubt has many times since exercised its option to provide street railway facilities through the procedure and competitive method of making an original grant, and when it does so, the grant when made is a separate and independent line. Because one of its termini connect with another line, it does not follow that it is merged in the line with which it connects, any more than the latter is thereby merged in the former.

The East Cleveland Railroad Company obtained another manifest advantage by the grant thus made. Its existing line expired on the 20th of September, 1879, whereas this grant was made to expire on the 14th of January, 1888.

The resolution of March 25, 1873 (Record, page 199), enforces this same view of a separate and distinct identity. The recital of the resolution is:

> "The East Cleveland Railroad Company desire and propose to connect their Garden Street branch with the main line of their road at the intersection of Erie and Prospect streets by laying double tracks from this point through Erie to Ohio street, and through Ohio street to Garden street, and to remove their track from Brownell street between Ohio street and Prospect street,"

and permission was accordingly granted.

Ever since 1868 all of the resolutions and ordinances of the Council in the title and in the body thereof refer to the street railway over this territory as the Garden Street branch

of The East Cleveland Railroad Company, or the Garden Street line, or the Garden Street main line. Never is it referred to as the Garden Street extension of The East Cleveland Railroad Company's main line or Euclid Avenue line.

The grant last mentioned fixes the western termini of the Garden Street line as the intersection of Erie and Prospect Street. From that point to the easterly end of the line on Garden Stret, now Central Avenue, and on Quincy Street, the legislation of the municipality has always applied separately from that applying to any other part of the line of The East Cleveland Railroad Company.

The original contracts of The East Cleveland Railroad Company for its several lines continued in force until new contracts were substituted by way of renewal in the year 1879 and 1880. The Council, notwithstanding both lines were then owned by the same Company, and notwithstanding the law had been changed so as to permit extension of tracks, treated the Garden Street line as a separate and distinct entity in making these renewal contracts. The renewal grant of September 15, 1879 (Record, page 204, 207), in entitled,

> "An ordinance granting a renewal of franchise to The East Cleveland Railroad Company to construct, maintain and operate its street railroad in and through certain streets of the City of Cleveland."

The ordinance in Section I describes the streets specifically as follows:

> "Commencing on Superior street at the intersection of Water street; thence through Superior street to and around the southwest corner of Monumental Square to Euclid avenue; thence through said avenue to Erie street; thence through said Erie street to Prospect street; thence through said Prospect street to Case avenue; thence through said Case avenue to Euclid avenue; thence through and along Euclid avenue to Willson avenue."

No part of the territory covered by the Garden Street line, it will be seen, is included in the specific description of the streets to which the right of renewal applied. The words exclude the idea that either the City or the Railroad Company had at that time any belief that the Garden Street line was other than a separate and independent line and to be dealt with as such.

The streets east of Willson Avenue are also excluded, showing that the Council then saw no difficulty in legislating for a part of one line even though certain other parts of it were operated in connection with it, or as a part of the same system. This is further manifest from the provisions of Section 14. That section provides, in substance, that the Council shall have the same power to regulate fares on the road east of Willson avenue, and to regulate the operation of that part of the road just as it might the portion west,

> "leaving the contract made between said Company and the Village of East Cleveland unaffected in all other respects."

Later, on April 4, 1883 (Record, page 29), by a separate ordinance, the Council granted The East Cleveland Railroad Company the right to extend, lay, and operate its double track on Euclid Avenue east of Willson Avenue, and provided that the right of said Company to have and operate its said railroad on said Euclid Avenue between the west line of Willson Avenue and the city limits shall terminate on the 20th day of September, A. D. 1904, with the said renewal of that part of said Company's line lying west of said Willson Avenue.

This, also, is specific in the streets covered by it, and does not include any part of the Garden Street main line.

It is impossible to imagine that these two ordinances alone could have operated as a renewal of the franchise for the Garden street line. Yet the basis for asserting that the franchise for the Garden street line is now controlled by the

ordinances prolonging the franchise of The East Cleveland Railroad Company to July 13, 1913, is very little more substantial.

The franchise of The East Cleveland Railroad Company for the line on Garden Street was renewed by a separate ordinance. (Record, page 208.) In view of the title to this ordinance, and the object to be accomplished by it, and also in view of the language permitting renewals only at the expiration of any existing grant, it is not surprising that the force and effect of this ordinance was afterwards challenged in the courts. The opinion of the Court (6 C. C., 318) discloses that the only questions discussed and considered were whether consents of property owners were required in the case of renewal grants, or whether the Council had power under the statute to make a renewal in advance of the substantial expiration of the existing grant. As already stated, the power to make the renewal was sustained on the theory that the existing grant was thereby surrendered and a new contract substituted in its place.

Yet, aside from the title and general scope of the ordinance, the language is express in that it confers the right

> "to equip and operate said extension and *its Garden street branch* for the period of twenty-five years from and after the passage of this ordinance."

It is also made subject to all the general ordinances of the City now in force; and they provide amply for all of the details of construction, operation and regulation, and rate of fare, such as is contained in the renewal grant for the Euclid Avenue line. Let the express and definite character of the right conferred to operate not simply said extension to a date beyond the expiration of the main grant, but also to operate the lines covered by the main grant to the same date as fixed in the extension ordinance, be constantly borne in mind when it is insisted, as it will be, that other track extensions conferring the right merely to operate the extension to a given date,

are to be taken as carrying with it by implication as necessary and as cogent as if expressly set down in apt English words, the franchises for all the other lines in any way reached from this extension. This clear and definite language used to accomplish a specific purpose, and appropriate to that end, could and no doubt would have been adopted had the Council intended to accomplish the same result as it did by the ordinance now under review.

Not only was the Euclid Avenue or main line of The East Cleveland Railroad Company treated as a separate and independent entity from that of the franchise for the Garden Street line in making these several renewal grants, but the two franchises were considered and treated as separate and distinct entities in granting the leave and permission to equip them by electricity.

The ordinance passed July 13, 1888, was entitled:

> "An ordinance granting The East Cleveland Railway Company the right to construct and operate an electric street railway on Euclid and Cedar avenues."

The Cedar Avenue line had been constructed in 1882 as a track extension of the Euclid Avenue or main line, and was expressly made to terminate with the grant for the main line. The ordinance authorizing the electric equipment specified the lines to be equipped as follows:

> "Euclid avenue from Willson avenue easterly to the city limits; Cedar avenue from a point near The Cleveland & Pittsburg Railroad Company's right of way in said avenue easterly to a point about 1500 feet east of Fairmount street."

Section 8 provided, in substance, that whenever the Council should require, the same power as therein provided should be used on the entire length of the main and Cedar Avenue lines.

Section 6, in part, provided, that if the Company should fail to extend said electrical system over the entire

main and Cedar Avenue lines within eighteen months from that date, the ordinance should be null and void, so far as it attempted to prolong the period of operation. This section also recited that the privilege of constructing the electric system and the operation of the lines as therein provided was granted in consideration of the improved facilities thereby contemplated, and the large expenditure necessary to secure the same, and should be in force for a period of twenty-five years from and after the date of the passage of the ordinance upon its main and Cedar Avenue lines.

Within eighteen months thereafter the Council required by resolution the equipment with electricity of the main and Cedar Avenue lines to the westerly termini thereof, subject to the requirements of said ordinance. If this resolution had not been complied with within eighteen months from July 13, 1888, the renewal would have become null and void, and the franchise on this line would have expired on September 20, 1904. The electrical equipment was, however, installed as stated in the bill (Record, page 119),

> "From Willson avenue through Euclid avenue to Case avenue; through Case avenue to Prospect street; through Prospect street to Erie street; through Erie street to Euclid avenue; through Euclid avenue to and along the Public Square to Superior street, and through Superior street to Water street; and also such portion of its Cedar avenue extension as had not theretofore been equipped with electricity."

On March 10, 1890, an ordinance was passed entitled:

> "An ordinance granting The East Cleveland Railroad Company the right to substitute electric motive power for horse power upon its Garden street branch."

Section I granted to the Company

"the right to operate its Garden Street branch by electricity, *i. e.*, from the intersection of Prospect and Erie streets, along Erie street to Ohio

> street; along Ohio street to Brownell street; along Brownell street to Garden street; and along Garden street to Lincoln avenue; also along New street from Garden street to Quincy street, and along Quincy street to Woodland Hills avenue."

This section further says:

> "Authority is hereby granted said Company to erect and maintain on said streets all necessary poles and wires, and the necessary appliances and fixtures for the conducting of electricity to operate by electric power the said Garden street branch *during the term of its present grant for said Garden street branch.*"

This last ordinance was accepted on April 4, 1890, and in its acceptance the Company

> "agree to abide by the provisions, conditions, limitations and restrictions contained in said ordinance."

Thus it will be seen from these ordinances that the franchise for the Euclid avenue line or the so-called main line of The East Cleveland Railroad Company and its track extension on Cedar avenue were treated as separate and independent of the franchise for the Garden Street branch or line. The parties so understood the status of the respective lines. A simple resolution requiring the Company to equip its main line to the westerly terminus thereof is construed by the Company to require the equipment only of the Euclid Avenue line. This construction was accepted and acquiesced in by the City. The provision in the ordinance of July 13, 1888, requiring the electric equipment of the entire main and Cedar Avenue lines within eighteen months under the penalty of rendering null and void the added term thereby conferred is contemporaneously construed not to include any part of the Garden Street line. The Garden Street line itself is made the subject of an independent act of legislation in the matter of electrical equipment.

These same ordinances fix and preserve a separate and independent date of expiration. The renewal franchise for the Euclid Avenue line was limited to expire in definite and express language on the 20th of September, 1904. The Cedar Avenue extension, by reason of the fact that it was an extension, as well as by express and definite provision, expired at the same date. As a consideration for providing at a large expense electrical equipment an added term of some nine years was conferred on the Company as to its franchises for those lines. The question of the length of time for which the road should be operated under these conditions and with this new motive power was definitely and clearly presented to the legislative mind, and was settled with equal definiteness and clearness.

The ordinance authorizing the equipment by electricity of the Garden Street line was passed within three days of eighteen months thereafter. It was accepted by the same officers of the Street Railway Company that had accepted the former ordinance and many others. The parties by language equally definite and express fix a separate and independent date for the expiration of the franchise for the Garden Street line. In other words, the right of operation with the new motive power is expressly made to terminate not with the grant for the main line, but with the present grant for the Garden Street line. This shows that the question of the length of time the right to operate on the Garden Street line was clearly presented to the legislative mind and that the parties will full knowledge of the added period of duration conferred on the other line, definitely declined to prolong the life of the Garden Street line to the same date.

From the initial grant on Garden Street to this date, the franchise or right to operate on the streets covered by what is known as the Garden Street line was treated as separate and distinct. The language used as applied to it, both in the title and the body of the several ordinances, extending

it, double tracking it, renewing it, or electro-equipping it, show that its identity as well as its period of duration was not controlled by any other line owned by the Street Railway Company. This long line of settled legislation; these many contemporaneous constructions of the grants with respect to it, leave the indelible conclusion that the franchise of the Garden Street line stands on a footing different from that of the other lines owned by The East Cleveland Railroad Company, and that it expires on the 22nd of March, 1905. The expression also is "the Garden street branch," "the present grant for the Garden street line," or the "Garden street main line." And since, on January 14, 1868, it was created and granted as a separate and original route, and on March 22, 1880, renewed as a separate and independent route, and on March 10, 1890, electro-equipped as a separate and independent route, it does violence to every consideration of law or propriety now to assert that it is merely an extension of the Euclid Avenue main line and has no separate contract life.

The ordinances relied on to discredit the foregoing conclusions are those of February 9, 1885 (Record, page 211); March 30, 1891 (Record, page 227), and April 20, 1891 (Record, page 228).

A few words, therefore, in discussion of each of these separate ordinances may be necessary to show their true relation to the matter under consideration.

The ordinance of February 9, 1885, is entitled:

> "An ordinance to permit The East Cleveland Railroad Company to extend the Garden street branch of its railway."

The ordinance on page 211 of the Record contains a mis-print, in that in the ninth line, the words: "and terminating with the grant for the main line" is omitted. The bill and answer (Record, paragraph 17, pages 117 and 146), as well as the stipulation of counsel show that these words are a part of the ordinance. The expression therein "terminating with

the grant for the main line" standing alone and taken out of the context might be held to refer to what has been usually called the main line of The East Cleveland Railroad Company, that is the line on Euclid Avenue. The title of the ordinance, in view of the statute law of Ohio, as well as the subject matter, tend to repel any such inference. The insignificance of the track extension as compared with the rest of the Garden Street line also repel such an inference. The language is limited to the extension thereby made, and it is inconceivable that the Council would intentionally fix a date of expiration for this small extension different from the line thereby extended; and to infer that the Council meant by implication also to prolong the life of the large trackage of the route to which the extension is annexed, is contrary to the usual rules of interpretation of contracts between private individuals, and in absurd violation of the rules of law with respect to which contracts in derogation of public right are construed. Especially is this true when in the ordinance of March 22, 1880 (Record, page 200) as well as in all of the ordinances renewing or prolonging the life of the franchises of The East Cleveland Railroad Company, we have found the Council using apt words whenever it meant to confer the right of continued operation for any part of the line not covered by the track extension.

The words

> "to equip and operate said extension as a single track railroad in connection with its said branch and main line"

are much relied on, and, it is insisted, the Council, by the use of such words, meant to prolong the life of the main line to the date fixed for the expiration of the right to operate the extension. This view has already been adequately discussed. In addition to what has already been said, it must be borne in mind that neither the Council nor the Railroad Company, until this litigation, ever attached any such meaning to such words.

In the ordinance of May 23, 1876 (Record, page 202), the expression is used

> "to equip and operate said extension for twenty years in connection with said branch and its main line."

This expression, if susceptible of the meaning now sought to be given it in other ordinances, would have prolonged the franchise of the Euclid Avenue line until May 23, 1896. It would also have prolonged the life of the so-called main line on Euclid Avenue until the same date. Nevertheless the company in 1879 sought and obtained a renewal of its franchise for twenty-five years from and after September 20, 1879, on the Euclid Avenue line. Notwithstanding this provision and the meaning now sought to be given it, on March 22, 1880, the Company sought and obtained a separate renewal of its franchise for its Garden Street line for twenty-five years from and after that date. This is a contemporaneous construction by the parties of this language which is not without force.

In addition thereto, let it be remembered that on February 5, 1885, the main line, meaning thereby the franchise of the Euclid Avenue line, expired September 20, 1904. If the meaning of the ordinance under discussion was such as is now insisted on, its effect was to shorten the franchise for the Garden Street line to September 20, 1904. Obviously it was not intended by the parties to have such an effect. It is equally obvious that the subsequent renewal by a separate ordinance of the Euclid Avenue main line limited expressly to the right to operate on Euclid Avenue could have no effect of changing the date fixed on Garden Street by this ordinance of February 9, 1885. This is applying the familiar rule that where a statute or an ordinance is incorporated into a contract, and that ordinance or statute is afterwards amended or changed, the amendment or change is not thereby incorporated into the contract.

This language, whatever may be its meaning and effect, is not used consistently by the Council in subsequent ordinances relating to the street railway on the streets covered by the Garden Street branch, so as to evidence any fixed intention or purpose.

On June 17, 1887 (Record, page 217), an ordinance was passed which is entitled:

> "AN ORDINANCE to permit The East Cleveland Railroad Company to extend the Garden street branch of its railway."

The language used so far from showing that the parties then thought the franchise for the Garden Street line had become merged in the franchise for the Euclid Avenue line and expired with it, shows just the contrary. The words "Garden street branch" in the title, and the words "branch and its main line," also the words "terminating with the grant for the *Garden street main line,*" followed with the words "on any part of its main line or on said extension by reason of said extension" as used in the body of the ordinance, show conclusively that on this date the parties regarded the franchise for the Garden Street line as separate and independent, and as having a separate and independent date of expiration. That there may be no doubt on this point, the Council used the words "terminating with the grant for the Garden Street main line." This shows that Garden Street was regarded as having a main line of its own separate from the so-called main line of The East Cleveland Railroad Company; and the expression "main line" as used in the ordinance of February 9, 1885, as well as of March 30, 1891, is just as referable to this view as to any other, and is supported by the inherent reasonableness of such a construction.

More important still is the fact that at a later date the Council and the Company made the contracts already reviewed for the electric equipment. These contracts preserve the separate identity of the franchises and the separate dates for ex-

piration. As to the Euclid Avenue main line and its extension on Cedar Avenue, a new date eight years in the future is agreed upon for a valuable consideration.

The ordinance authorizing electric equipment on the Garden Street branch is limited by its title to effect a purpose distinctly different from that authorizing the electric equipment of the Euclid Avenue line. That authorizing the electric equipment on Euclid and Cedar Avenues describes its purposes in the title as granting

> "the right *to construct and operate an electric street* railway on Euclid and Cedar avenues."

This was manifestly proper if, as seems to have been the fact, it was intended to make an entirely new contract, and to fix a new duration of the term for the operation of the road. A new date of expiration was so fixed.

The ordinance, however, authorizing electric equipment on the Garden Street line describes its object in the title as

> "granting the right *to substitute electric motive power* for horse power upon its Garden street branch."

This was eminently proper, if, as the fact seems to have been, it was intended not to prolong the period of operation, but merely to authorize a change in motive power. The ordinance, however, deals with the entire length of the Garden street line, to-wit, from the intersection at Prospect and Erie streets with the so-called main line on Euclid Avenue easterly over all the streets along which the Garden Street branch had at any time by any ordinance or resolution been extended. The right of operation by electricity covers all this territory, but it does not cover any other territory. Now, as has been urged many times in kindred branches of litigation, it was germane to the object to be accomplished by this ordinance to deal with the period during which the right to operate by electricity should continue. At all events, the ordinance did so deal with it. The right of operation is only "during the

term of its present grant for the Garden street branch." If it be true that all parties to this contract had thought the preceding ordinances had destroyed the separate identity of the Garden Street branch, or if it had been intended by this ordinance to make its right of operation co-determinate with that on Euclid Avenue or the main line, it would have been easy to have said so. Had the Council merely used the language "terminating with the grant for the Company's main line" there might have been much to be said in favor of the plaintiff's present contention; but this ordinance looks backward, not to the franchise on Euclid Avenue or the main line for the date of expiration, but to the present grant of the Garden Street branch, a grant which, as we have seen, was originally created as a separate and independent line, and continuously dealt with and renewed as a separate and independent line. The Council must have meant and did mean by this language to fix and adopt the date of March 22, 1905, as the date for the expiration of the right to operate by electricity on the streets described in this ordinance. And those streets are the only ones now in dispute.

This conclusion is sustained by the decision of this Court in the case of *City of Cleveland v. The Cleveland Electric Railway Company*, 201 U. S., 529. It was held in this case that in authorizing a change from animal to electric power and providing for the continued operation of the road with the new power

> "until the expiration of the present grant of the Company, to-wit, February 10, 1908,"

a uniform date of expiration was also fixed for all the lines over which the electric equipment was extended. In consequence of this ruling, a franchise for a part of the lines which had been limited to expire September 20, 1904, was prolonged until the 10th of February, 1908.

The ordinance of March 30, 1891 (Record, page 227), apparently has no other object as disclosed by the title or the

body of the ordinance than to authorize the construction and operation of a second or additional track. This additional track was for a short distance between Willson Avenue and Baden Street. It was not even an extension of existing tracks. The right to construct and operate a street railway on this section of Garden Street had been conferred by previous ordinances. The street railway was already there in existence and in operation. To facilitate the more convenient operation of the road, an additional track was authorized. There are no words in this ordinance such as has been so much dwelt on providing that these tracks shall be *operated in connection with existing tracks* on the Garden Street or any main line. The permission is merely to lay and operate a second or additional track, and to connect said tracks with the tracks already upon Central avenue, formerly Garden street. The language is:

> "The right herein granted shall be valid until the expiration of the grants for the Company's main line."

It is inconceivable that in granting a right of such relatively small consequence, there should have been concealed a latent purpose to have fixed a new date of expiration not only for this track, but for all the track upon Garden street. Apt language to accomplish such a result had been used many times by the Council. If such a purpose had been definitely and clearly presented for the consideration of the legislative mind, it is by no means certain that the ordinance in any form would have been adopted. Manifestly the privilege of operation for a longer period than that definitely fixed, if it exists in these words was so covered up and cloaked by artful duplicity of language that no member of the Council, even had he been a lawyer, would have discovered it.

It must also be borne in mind that the Garden street or Central avenue *had a main line of its own.* The expression used in the ordinance of June 17, 1887, was "The Garden street main line."

The privilege of laying an additional track was merely an incident to the principle subject of a previous valid grant. The second track is neither an extension nor a renewal. It is not the establishment of an original route. It is not governed by the requirements of Section 2502 or 2505. It is a mere incident of the contract between the City and the Street Railway Company. It is, like an extension, a mere integral part, but only a part of the main body of the property. The life of the right to operate it must, in the very nature of things, terminate with the life of the main body of which it is a part.

These observations which are abstracted in the main from the opinion of the learned Judge of the Court below conclusively forbid the giving of any effect to this ordinance so far as it is contended it prolongs the life of the franchise of the Company.

The ordinance of April 20, 1891 (Record, page 228), is also an ordinance having for its sole object the granting of permission to lay an additional track in Quincy street. All the observations made in regard to the last ordinance under review apply with equal force to this ordinance. The expression as to the duration of the right is that

> "it shall be valid until the expiration of the grants of said Company's tracks on Quincy street east of Lincoln avenue, to-wit, July 13, 1913."

This language carries with it less weight even than that of the last ordinance. The expression "the Company's main line" is more confusing and more readily susceptible of being twisted into an inference that there was some relation between the right thereby granted and the franchise of the Company on Euclid avenue, for the latter has been usually spoken of as the main line of The East Cleveland Railroad Company. This street, however, is a different one from that mentioned in the last ordinance, and the expression used shows that the Council had not yet imbibed the idea that the grant for the Garden

street or Central avenue line had lost its separate and independent existence and was merely an extension of the main line and Euclid avenue, and expiring at the same time. The language recognizes the fact that the grant of the Company on Quincy street is a different matter from the grant of the Company on some other street.

The Company's tracks on Quincy street east of Lincoln avenue were authorized by the ordinance of February 9, 1885. That ordinance did not fix July 13, 1913, as the date for the expiration of the grant. The expression in the ordinance of February 9, 1885, "terminating with the grant of the Company's main line" could have meant only one or the other of two dates, September 20, 1904, or March 22, 1905, and if the former of the two dates is meant, then it was prolonged by the ordinance of March 10, 1890, authorizing electric equipment until March 22, 1905, the date adopted thereby for the expiration of all the Garden street line. The words, "to-wit, July 13, 1913," are an obvious mistake. The draftsman, if he consulted the ordinance of February 9, 1885, may readily have seen that the main line on Euclid avenue had been prolonged to expire July 13, 1913, and used language assuming this date; but by no means undertaking to fix it as the date of expiration for the right thereby granted. As was stated in the opinion of the Court below:

> "The conclusive answer is that the grant for the Company's tracks in Quincy street east of Lincoln avenue did not and would not expire July 13, 1913. The ordinance did not state the fact."

The mis-recital after the *videlicit* cannot control the fact which is made the primary test as to the date of expiration of the new right conferred by the ordinance last mentioned. The uniform rule of construction when there is a conflict between the precedent matter and that which follows a *videlicit* is well known. The former controls and the latter is disregarded.

Sullivan vs. State, 67 Miss., 346;

Gleason vs. McVickar, 7 Cow., 42, 43;
Commonwealth vs. Quinlan, 153 Mass., 483-4;
Buck vs. Lewis, 9 Minn., 314;
Stukeley vs. Butler, Hob., 175;
Cotton vs. Ward, 19 Ky., 310.

Still further enforcing this conclusion are the two ordinances of July 17, 1893 (Record, page 232-4), and of June 25, 1894.

The one first mentioned authorizes The Cleveland Electric Railway Company which, by this time had absorbed the lines of The East Cleveland Railroad Company, to extend its tracks in Prospect street from Erie to Ontario street, and along certain parts of Seneca, Lake and Ontario streets. This was a physical addition to the tracks previously maintained in Prospect street and which were and had been from 1859 a part of the Euclid avenue or main line of The East Cleveland Railroad Company. The streets covered are not a part of those included in the Garden street line which, while made to commence at the same point of intersection, are constructed therefrom in a different direction. The language as to the expiration of the right is definite and express. It is:

> "This grant shall be in force until the 13th day of July, 1913."

Mark the apt English words which the parties make use of when they intended to confer a right to operate a track extension to a specific date! It does not say that the grant shall be in force until the expiration of the Company's grant for its tracks in Prospect street, to-wit, July 13, 1913; but to the specific, definite date. Inasmuch as the tracks which were being added to by this extension did expire on the 13th day of July, 1913, there was no necessity for the use of any circumlocution, and none was attempted or practiced. The fact that in making the extension on Quincy street the right was limited to expire with the Company's tracks in Quincy street east of Lincoln avenue implies that a different thought was

in the minds of the parties, and that thought was not to prolong the right to operate tracks in Quincy street beyond the date of pre-existing grants, and to make the right to operate the additional track expire with the expiration of the existing tracks.

The other ordinance of June 25, 1894, granted the right to extend tracks in Quincy street westwardly from New street to Willson avenue. Previously, the connection between Garden street or Central avenue and Quincy street had been made by way of New street. This ordinance removed the tracks from New street, extended the tracks westwardly in Quincy, and made the connection by way of Willson avenue. The observations heretofore made with respect to other ordinances apply with full force to this one. It would have been easy had the Council so intended to have said that this right shall expire with the grant for the Company's tracks in Willson avenue on July 1, 1914. It would also have been easy for the Council to have said that the right to operate the rest of the tracks in Quincy street shall be prolonged until a fixed date or until the date for the expiration of the grant in Willson avenue or in Euclid avenue. But the Council did nothing of the sort.

The language is:

> "This grant shall terminate with the grant for said Company's present line in Quincy street."

This also repels the inference that any one then believed that the Central avenue or Garden street franchise had become a part of a system or of the Euclid avenue line, and a new date of expiration had been fixed for the grant in Quincy street. The mere fact that the expression used is "the grant for said Company's present line in Quincy street" shows that the Company was intending to preserve the independent and separate identity of the Quincy street line, and also of its date of expiration. There is no expression that the extended tracks shall be operated in connection with any oth-

er tracks, or with the Company's main line or such like words which have been relied on in other connections as authorizing a right to operate the entire street railway as a system to a fixed date.

We submit, in conclusion, there is nothing in any of these ordinances adopted at any time which tend to support the idea that the Council had destroyed the separate existence of the franchise for the Garden street line and its extensions or that this line had been merged in the Euclid avenue main line in such a way as to confer the right to operate it to the same date; but on the contrary these ordinances, like all the others which we have reviewed, tend to create the indelible conclusion that the life of the Garden street line and the right to operate it throughout its length and over all its extensions and additional tracks was intended to expire at the same date, and that that date is March 22, 1905.

In this connection we abstract and adopt the language of the learned Judge who delivered the opinion of the Court below. After all, the conclusively satisfactory answer to the contention that the three ordinances relied on have the effect claimed for them is that it is intolerable to think that instead of using direct, explicit and easily framed language to grant a right which only the sovereign can grant, it may be conveyed by an implication to be raised by a process of reasoning which the lay mind has difficulty in comprehending, and which it could hardly discern at all if not pointed out; and that this implication may be so derived from apparently innocuous and insignificant words lost in the mazes of an ordinance of relatively small consequence. Fundamental powers of the sovereign to be used by a delegated body naturally untrained in the law's learning and rigidly restricted in its use, are not to be so exercised. In view of the contention here made, it is most significant and astonishing that in no single instance of an extension ordinance or of a right to lay an additional track does the title of the ordinance state that any such object was

in view, or that any prolongation of the time for expiration of either the main line or the Garden street branch was involved in the permission thereby given for the construction of an extension, or the laying of an additional track. But the law explicitly requires that the subject of an ordinance shall be clearly expressed in its title. What could more surely do violence to the letter and spirit and purpose of that legal requirement than to say that an ordinance entitled, an ordinance to permit some petty and relatively unimportant extension, should be found to contain within its sophisticatal implications a grant renewing for a term of years an important and far reaching franchise. Can such an implication from such an ordinance so entitled be justified either on the ground of reason or of propriety?

The soundness of the conclusion of the Court below that the right to lay an additional track, or merely to extend existing tracks are by statute made to expire with the existing tracks so extended, cannot, we think, be successfully denied. Such was the object and purpose of the statute. The reasons of the Court below leave nothing to be added upon this point.

This being true, in the absence of explicit, express and unequivocal language disclosing an intention to relinquish the pre-existing franchise for the lines so extended, and to make a renewal grant in the place thereof, this rule of law would control any definite language fixing for the extension of tracks or the additional track a date of expiration beyond that of the original grant. Either the original grant must be surrendered and a renewal grant made at the time and by the ordinance making the extension or authorizing the additional track; or any new and independent life with which the extension of track is endowed, must, of necessity, be controlled by the life of the parent grant.

The consequences of inferring an intent to surrender

the parent grant and to renew it from words apparently limited to the new right of extension conferred by the ordinance, are too far reaching to warrant the adoption of a contrary view. It is manifest the Council of the City of Cleveland never entertained the idea that such implications could be drawn from its acts. No doubt the person seeking a right in public property will take anything that can be had, and will accept for an extension the longest date of expiration the Council will confer. But to permit the trackage of a system hundreds of miles in length to be prolonged by such implications in an ordinance authorizing the extension of a few hundred feet, is to do violence to every known rule of law. Rather, the rule as to the expiration of such extensions with the expiration of the parent grant must and will apply in all cases where there is not plain, direct and unequivocal English words authorizing in direct terms the renewal or prolongation of the life of the parent grant.

Attention is called to the fact that the street railway franchises now owned by the plaintiff were all created and granted as original routes for separate and independent lines. There were not less than ten of them owned at one time by not less than six different companies. In effect, these made ten different street railway routes, and the ordinances establishing such routes and granting leave to construct and operate created in the grantees an easement or privilege in the streets which may be likened unto a leasehold interest for a fixed term.

It will be noted that these expire at different dates unless the contention that a unified system has been created which must, of necessity, expire at one time, or unless an extension of tracks granted to the consolidated company operates as an extension of franchises for all the rest of the trackage.

The considerations which have been herein urged might be applied with equal force to every one of these routes. That

is to say, an examination of the origin and development of each one of these routes would show that the Council as well as the grantees had acquired and dealt with and legislated for each of these routes as a separate, distinct entity. The considerations urged here in order to support the conclusion desired should be of sufficient weight to control the situation with respect to each of these independent routes which may be in many instances more distinct and definite than the independent identity of the Garden street line.

We respectfully submit that the contention of the plaintiff in this respect cannot be maintained.

VIII.

THE FAILURE OF THE COURT BELOW TO DECLARE THE ORDINANCE OF JANUARY 11, 1904, WHOLLY NULL AND VOID.

The plaintiff below assigns as an additional ground of error that the Circuit Court did not in its decree declare entirely null and void the ordinance of January 11, 1904. It asserts that this ordinance was not only void as impairing the obligation of its contract and as taking a part of its property without due process of law, but that it is also void because made in contravention of the laws of the State of Ohio.

Under any view of the case, we submit the plaintiff by the decree was given all the relief to which it was entitled. A sufficient answer to its assumption that the decree should have gone further is that the plaintiff had no right to protect except what was protected, namely, its property in its tracks, poles, wires and appliances constructed and maintained in the streets. Its right to continue the operation of a street railway therewith in the street was held not to exist. Not having any further right to protect, it was not error in the Court below to have refused to annul wholly said ordinance, even though the position was well taken in law.

That position is this: The Council of the City of Cleveland, without public notice and competition as to the rate of fare such as is required when an original street railway route is established and a grant made based thereon, made a direct grant to The Forest City Railway Company, assuming its right to do so on its interpretation of the statute authorizing renewals on terms considered by it conducive to the public interest. If such a grant can be made to any person other than the one to whom the initial grant was made or one in privity with him, then such advertisement and competition, it is conceded, are not necessary. The debatable question is whether such a direct grant can be made on the same footing as if an existing street railway grant was being renewed to the owner thereof.

This question is in issue in a suit pending in the state courts of Ohio and is still undetermined. The Court of first instance held adversely to the position of the City and of The Forest City Railway Company. The reasons for such holding appear in a copy of the opinion of the Judge of the Court of Common Pleas of Cuyahoga County appearing in this Record, pages 96 to 104. Whether that holding is correct or not is properly triable in the State Court.

The plaintiff in this case has no right to try that question. So far as it is concerned, the question does not arise and cannot arise on the pleadings in this cause. It sued herein, not as a tax-payer or a member of the corporation of the City of Cleveland seeking to enjoin an act of the municipal authorities in contravention of law, but merely to protect a contract or a property right. In so doing, we submit, public questions such as go merely to the irregular exercise of a plenary power vested in a co-ordinate branch of the Government, cannot be litigated.

Sections 1777, 1778 and 1779 of the Revised Statutes of Ohio (see Appendix hereto) have vested that power in the City Solicitor. He shall apply in the name of the corporation

for an order of injunction to restrain the misapplication of the funds of the corporation or the abuse of its corporate power or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same, or which was procured by fraud or corruption.

In case he fails to do so, any taxpayer of the corporation may request him in writing so to do, and if he fail or refuse, then the taxpayer may institute such suit in his own name on behalf of the corporation. The effect of these provisions is not only to provide a remedy, but to draw within the control of the public authorities in a suit to be conducted in behalf of the corporation and binding all of the taxpayers thereof, all rights of action to annul the public acts of the legislative department of a municipality. See the following cases:

Hensley vs. Hamilton, 3 O. C. C., 201, 206;
White vs. Village of Pleasant Ridge. 12 C. C., 177;
Hallock vs. Columbus, 1st N. P. n. s., 205.

Not only did the plaintiff not sue as a taxpayer to protect the public right, but at the time this suit was instituted, neither a taxpayer nor the City Solicitor could have brought such a suit. The grant was made on January 11, 1904. The bill in this case was filed on the 21st of March, 1905, more than a year thereafter.

Section 137 of the Municipal Code of Ohio (R. S. 1536-663; see Appendix) has adopted a statute of limitations which applies to acts of this character. It was passed October 22, 1902, and went into effect May 4, 1903. It is a matter of public history that the object in passing it was to protect certain street railway grants in the City of Cincinnati that had been irregularly made, and attack upon which was threatened on the ground that they had been made in cor-

as is contemplated shall be brought or maintained unless such action is commenced within one year from the date of such contract. A grant or leave to construct and operate a street railway company has been held in Ohio to be a contract within the meaning of these sections.

Cincinnati, etc. Ry. Co. vs. Smith, 29 O. S., 291.

IX.

THE ERROR COMPLAINED OF IN THE CROSS APPEAL.

The defendants below, The Forest City Railway Company, and the City of Cleveland, in their cross appeal assign as error the action of the Court below in holding that the ordinance of January 11, 1904, attempted to confer on The Forest City Railway Company a right to take the tracks, poles, wires and appliances erected and maintained in the streets, and in awarding an injunction against the two defendants by reason thereof.

This assignment of error presents for consideration the following questions:

First. Was there made on the bill and answers any case tending to show that there was any pending attempt to take, without due process of law, any property right of the defendant in the tracks, poles, wires and appliances erected in the streets?

Second. What property right, if any, a street railway company has in the tracks, poles, wires and appliances erected in the streets under a determinate grant at or after the expiration of their grant?

Speaking to the first question, we admit that if the plaintiff has a property right after the expiration of its grant in such tracks, etc., the ordinance of January 11, 1904, and the allegations of the plaintiff's bill makes the case sufficient to justify an injunction. The averments of the bill,

however, are in part denied by the answer. The provisions of the ordinance, so far as they are susceptible of the construction put on them in the bill, are qualified by the subsequent proceedings under the ordinance and disclaimers of the answers by the defendants.

See paragraphs 18 and 19 of the answer (Record, pages 177-8).

The answer and the subsequent resolutions of the Council manifest no intent to deliver the possession of any property of the plaintiff to the defendants, but only to deliver possession of the streets occupied by the plaintiff. As to its tracks, poles and wires the most that is threatened is to institute or cause to be instituted such proceedings as may be appropriate in a court of competent jurisdiction, to determine whether or not the plaintiff had any property right in its tracks, etc., after the expiration of its franchise, and to ascertain the value thereof. A threat to institute a suit in a court of competent jurisdiction and a disclaimer of any intent to proceed otherwise scarcely makes a sufficient case to warrant the granting of an injunction to prevent the taking of that property without due process of law.

Speaking to the second question above stated, we admit our inability to present to the Court any controlling authority.

In Ohio, however, the municipalities are the owners of the fee in the streets.

Traction Co. vs. Parrish, 67 O. S., 181.

Rails, ties, poles, when laid and constructed on an ordinary right of way of a railroad company, become a part of the realty both for the purpose of taxation and as between the mortgagee of the realty and the mortgagee of the chattel given before it was annexed to the realty.

Cleveland vs. C. and N. Ry. Co., 1st Cleve., 304;
Northern Indiana Ry. Co. vs Connelly, 10 O.

S., 160. Opinion page 164.

Merriam vs. Brown, 128 Mass., 391;

Hunt vs. Bay State Iron Co., 97 Mass., 279;

Clemens Elec. Mfr. Co. vs. Walton, 173 Mass., 286;

Providence, etc., Ry. Co. vs. Wright, 5 R. J., 459.

With respect to rails, ties and poles erected in a street for the purpose of operating a street railway, the reasons for holding that such property become permanently a part of the realty are even stronger. It is a matter of common knowledge that poles are erected with concrete foundations, making it impossible to remove the pole except by severing it at the surface of the earth. The ties and tracks are constructed chiefly below the surface of a street, and are paved over and about in such a way as to expose only the upper surface of the rail. Such property can only be removed by destroying practically sixteen feet of paving and changing entirely the character of that part of the street. The right of removal which a tenant possesses may be exercised only when there is no substantial injury to the realty.

Even in those cases of landlord and tenant in which the right of removal exists, it must be exercised at or before the expiration of the lease. In this case, at the time the decree was made, the right of the complainant in the streets had expired. It stood in the same situation as a tenant for a fixed term, who, if he wishes to exercise his right of removal, must do so before the expiration of his term. The law with respect to landlord and tenant may be found in the following authorities:

2 *Taylor, Land. and Ten.,* 8 Ed., Sec. 55;

Watriss vs. First National Bank of Cambridge, 124 Mass., 694; 26 Am. Rep., 694;

Stokee vs. Upton, 40 Mich., 581; 29 Am. Rep., 560;

Ex-Parte Brook, 10 Chan. Div., 100, per Thesiger, L. J.;
Merritt vs. Judd, 14 Cal., 59;
Loughran vs. Ross, 45 N. Y., 792;
Carlin vs. Ritter, 68 Md., 478; 6 Am. Rep., 467;
Hafleck vs. Stover, 11 O. S., 482.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the Court below did not err in holding that the plaintiff's right to operate on Garden or Central avenue expired as of the 22nd day of March, 1905; nor in refusing to declare wholly null and void the ordinance of January 11, 1904; and it is insisted that the decree should be modified so far as it holds that the plaintiff below had any property right in its poles, tracks, wires and appliances erected in the streets after the expiration of its right to maintain the same, and awards an injunction against the defendants on account of any alleged interference therewith without due process of law.

Respectfully submitted,
D. C. WESTENHAVER,
Counsel for The Forest City Railway Company.

Garfield, Howe & Westenhaver, of Counsel.

Appendix.

AN ACT
TO PROVIDE AND REGULATE STREET RAILROAD COMPANIES.

58 O. L., pp. 66-67.

"Section 1. Be it enacted by the General Assembly of the State of Ohio, That any number of natural persons, not less than five, associating to form a company for the purpose of constructing a street railroad, and becoming incorporated under this act, shall under their hand and seals, make a certificate, which shall specify as follows: 1. The name assumed by such company, and by which it shall be known. 2. The name of the street, alley, or avenue, with a description of the locality thereon of each terminus of said road, and the names of the streets, alleys, and avenues or other public grounds, through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the secretary of state, who shall record and carefully preserve the same in his office; and a copy thereof, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such company.

"Section 2. That when the foregoing provisions have been complied with, the persons named as corporators in said certificate, and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects named in said certificate, in accordance with the provisions of this act; to make and use a common seal, and the same to renew or alter at pleasure—and do all needful acts to carry into effect the object of the incorporation. Such corporation shall be authorized to construct, operate and maintain a street railroad,

with single or double track, on the streets, alleys, or avenues, or other public ground specified in the certificate, with such side-tracks, turn-outs, offices, buildings and depots as they may deem necessary, between the points of termini named in the certificate, and transport thereon passengers and their packages and baggage.

"Section 4. That whenever the lines of road of any street railroad companies meet or intersect, and have been or may be constructed so as to admit the passage of cars over such roads continuously, without break or interruption, they are hereby authorized to consolidate themselves into a single corporation, in the same manner provided for the consolidation of railroad companies in sections twenty-one, twenty-two and twenty-three of the said act entitled an act to provide for the creation and regulation of incorporated companies in state of Ohio, passed May 1, 1852; and the said sections are adopted and made to be part of this act.

"Section 5. That hereafter, no street railroad shall be constructed or commenced until the consent of the city council or corporate authorities of the city, town or village wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals, shall construct and operate a street railroad in such city, town or village: Provided, that no grant to occupy any street, lane or avenue, or public ground in any city of the first class, containing a population exceeding eighty thousand inhabitants, shall be made, except in accordance with sections fifteen and sixteen of an act passed March 3, 1860, relating to cities of the first class, having a population exceeding eighty thousand inhabitants."

Passed April 10, 1861.

AN ACT

TO AMEND "AN ACT TO PROVIDE FOR AND REGULATE STREET RAILROAD COMPANIES," PASSED APRIL 10, 1861, AND SUPPLEMENTARY THERETO. (Ohio Laws, vol. 58, p. 66.)

63 O. L. p. 55.

"Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That hereafter no street railroad shall be constructed or commenced until the consent of the council or corporate authorities of the city or incorporated village wherein such road is to be constructed shall have been first obtained, and it shall be competent for the council or corporate authorities of any city or incorporated village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals shall construct and operate a street railroad in such city or village.

"Section 2. That the council of any city or incorporated village shall prescribe by ordinance the manner and the terms and conditions upon which the streets and avenues of such city or incorporated village may be used or occupied by street railroads, and shall make no grant and give no consent for the use or occupation of the streets or avenues for a street railroad until the public notice of the intention to make the grant, or give the consent and inviting proposals therefor at a specified time and place, shall be published for three successive weeks in one or more of the principal newspapers of said city or incorporated village, or having circulation therein; nor shall such grants be made or consent be given, except to such a company or such individuals, or company of individuals, as will agree to carry passengers upon said railroad at the lowest rates of fare, and all reductions of the rates of fare shall inure to the benefit of the passengers carried.

"Section 3. That when any council of any such city or incorporated village shall grant or give its consent to the use of the streets or avenues of said city or incorporated vil-

lage for a street railroad, the company, or individual, or company of individuals, obtaining such grant or consent, shall not proceed to construct said road, until the consent in writing of a majority of the owners of the lots abutting upon the street or avenue in which said road is to be constructed, shall have been obtained, and filed with the council of such city or incorporated village, and notice of such filing published as provided in the preceding section, not until the council, being satisfied that such consent has been obtained, shall so declare by ordinance or resolution, except as provided in the next succeeding section of this act."
March 27, 1866.

AN ACT
SUPPLEMENTARY TO "AN ACT SUPPLEMENTARY TO AN ACT TO PROVIDE FOR AND REGULATE STREET RAILROAD COMPANIES," PASSED MARCH 27, 1866. (S. & C., and S. C., 280, 281.)

66 O. L. p. 140.

"Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That it shall be lawful for the council of any city or incorporated village to grant permission by ordinance to any person or company, owning or having the right to construct any street railroad, to extend their track, subject to the provisions of sections four and five of said act passed March 27, 1866, on any street or streets where the said council shall deem such extension beneficial to the public. And when any such extension shall be made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation; said sum shall include the government tax.

"Section 2. This act shall take effect from and after its passage."
Passed May 7, 1869.

Bates An. O. S., Vol. 1, p. 767.

(1536-131) M. C., Sec. 28.

In all municipal corporations council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause the same to be kept open and in repair and free from nuisance; and with respect to the dedication, opening and vacation of streets, as well as labor upon them, sections 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2649-1, 2649-2, 2649-3, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2660, 2661, 2662, 2664, 2664-1, 2664-2, 2664-3, 2664-4, 2664-5, 2664-6, 2664-7, 2664-8, 2664-9, 2664-10, 2664-11, 2664-12, 2664-13 and 2664-14, shall be and remain in full force and effect. (96 v. 31, Sec. 28, October 22, 1902; in effect May 4, 1903.)

(1536-65) R. S. Sec. 2600.

After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner or owners before some officer authorized to take the acknowledgment of deeds, who shall certify his official act on the plat or map; and if any owner is a non-resident of the state, his agent, authorized by writing, may make such acknowledgment; and such plat or map, and if the execution is by agent, his written authority, shall thereupon be recorded in the office of the county recorder. (29 v 350, Sec. 4; S. & C. 1483; R. S. of 1880.)

"Sec. 3443 R. S. Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railway may be construed, operated, extended and consolidated."

"Section 3437 R. S. Street railways, with single or double tracks, side tracks, and turn-outs, may be constructed or extended within or without and partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed."

"Sec. 1536-184. Sec. 2501. No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and con-

ditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

"Sec. 1536-185. Nothing mentioned in section 2501 of the Revised Statutes of Ohio shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council; and no ordinance for the purpose specified in section 2501 of the Revised Statutes of Ohio shall be passed until public notice of the application therefor has been given by the clerk of the corporation once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers, published in the corporation; and no such grant as mentioned in section 2501 of the Revised Statutes of Ohio shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed;

Provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant."

"Section 1536-188 R. S. Sec. 2505: The Council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections three thousand four hundred and thirty-seven, three thousand four hundred and

thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two and three thousand four hundred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation."

(1536-663) M. C. Sec. 137. (Solicitors: Election, term and qualifications.)—The solicitor shall be elected for a term of two years, and shall serve until his successor is elected and qualified. The solicitor shall be an elector of the city, and admitted to practice law in the courts of Ohio.

(Powers and duties.)—The powers and duties of the solicitor shall be such as are provided in sections 1776, 1777, 1778, 1779 and 1780, of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts having uniform operation throughout the State and not inconsistent with this act, and he shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this act as legal counsel and attorney; provided that no action, as provided in sections 1777 and 1778, to enjoin the performance of a contract or the payment of any bonds heretofore or hereafter entered into or issued by a municipal corporation, shall be brought or maintained unless such action is commenced within one year from the date of such contract or bonds, and this provision shall apply to pending cases.

(Shall be prosecuting attorney of police court.)—The solicitor shall also be prosecuting attorney of the police court, and shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow; provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court. The duties of the solicitor as prosecuting attorney of the police court shall be such as are provided in

section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the State and not inconsistent herewith. In case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, the provisions of section 1815 of the Revised Statutes shall apply. (96 v. 65, sec. 137, October 22, 1902; in effect May 4, 1903.)

(1536-667) R. S. Sec. 1777. (City solicitor shall apply for injunction in certain cases.)—He shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, of the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same, or which was procured by fraud or corruption. And he shall likewise, whenever an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, apply for the forfeiture or the specific performance of the same as the nature of the case may require. And in case any officer or board fails to perform any duty expressly enjoined by law or ordinance, he shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty. (66 v. 175, sec. 159, R. S. of 1880; 81 v. 189; 87 v. 122.)

(1536-668) R. S. Sec. 1778. (When the taxpayer may institute suit.)—In case he fail upon the request of any taxpayer of the corporation to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purposes in his own name, on behalf of the corporation; provided that no such suit or proceeding shall be entertained by any court until such request shall have been first made in writing; and further provided that no such suit or proceeding shall be entertained by any court until such taxpayer upon motion of the solicitor or corporation counsel shall have given security for the costs of the proceeding. (67 v. 72, section 160, R. S. of 1880; 87 v. 122; 95 v. 317.)

(1536-669) R. S. Sec. 1779. (Duty of court.)—If the court hearing such case is satisfied that such taxpayer had good cause to believe that his allegations were well founded, or if the same is sufficient in law, it shall make such order as the equity and justice of the case demand;

(Costs.)—and in such case the taxpayer shall be allowed his costs; Provided, That if judgment is finally ordered in favor of such taxpayer he may be allowed as part of the costs a reasonable compensation for his attorney. (66 v. 175, section 161; R. S. of 1880; 95 v. 317.)